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Supreme Court of the United States.

OCTOBER TERM, 1906.

ORIGINAL.

Office Supreme Court, U. S.
FILED.
MAR 27 1907
JAMES H. McKENNEY,
CLERK.

IN THE MATTER

of

THE APPLICATION OF JAMES POLLITZ FOR A WRIT OF MANDAMUS AGAINST THE HONORABLE E. HENRY LACOMBE, CIRCUIT JUDGE OF THE UNITED STATES FOR THE SECOND CIRCUIT, AND AGAINST THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

PETITION FOR MANDAMUS AND MOTION FOR LEAVE TO FILE THE SAME, AND FOR RULE.

ROGER FOSTER,
Of Counsel for Petitioner,
35 Wall Street,
New York.

IN THE

Supreme Court of the United States. 1

IN THE MATTER

OF

The Application of JAMES POLLITZ for a Writ of Mandamus against the Honorable E. Henry Lacombe, Circuit Judge of the United States for the Second Circuit, and against the Circuit Court of the United States for the Southern District of New York. 2

And now comes the petitioner, James Pollitz, by Roger Foster, his attorney and counsel; and he moves for leave to file the petition for a writ of mandamus, hereto annexed; and he further moves that a rule be entered and issue directing the Honorable E. Henry Lacombe, Circuit Judge of the United States for the Second Circuit and for 3 the Southern District of New York, and directing the Circuit Court of the United States for the Southern District of New York to show cause why a writ of mandamus should not issue against them and each of them in accordance with the prayer of the said petition, and why said petitioner should not have such other and further relief in the premises as may be just and meet.

ROGER FOSTER,
Attorney and Counsel for Petitioner James Pollitz.

4 TO THE HONORABLE MELVILLE W. FULLER, CHIEF JUSTICE OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of JAMES POLLITZ, a citizen and resident of the City, County and State of New York, respectfully shows:

I.—Heretofore and on or about January 15, 1907, your petitioner duly began an action in the Supreme Court of the State of New York, in which action your petitioner was plaintiff and the following persons were defendants: The Wabash Railroad Company, a consolidated corporation organized and ex-
5 isting under the laws of the States of Missouri, Ohio, Indiana, Michigan and Illinois, respectively, which then was and still is a citizen of each of said States; The Mercantile Trust Company, The United States Mortgage and Trust Company, The Metropolitan Trust Company of the City of New York, and the Bowling Green Trust Company, each of which trust companies then was and still is a corporation organized and existing under the laws of the State of New York, with its office and place of business in the City and County of New York, and a citizen of said County and State of New York, Edgar T. Welles, Robert C. Clowry, Winslow S. Pierce, Rob-
6 ert M. Gallaway, Thomas H. Hubbard, John T. Terry, John C. Otteson, Henry Evans, Henry K. Pomroy and George M. Cumming, each of whom then was and still is a citizen of the State of New York, George J. Gould, who, upon information and belief, then was and still is a citizen of the State of New Jersey; James B. Forgan, Frederick A. Delano and Edward T. Jeffery, who, upon information and belief, then were and still are citizens of the State of Illinois; and J. C. Van Blarcom who then was and still is a citizen of the State of Missouri. Said action was then begun by a service of a summons and complaint on the defendants Wabash Railroad Com-

pany, Jeffery, Otteson, Pierce, Mercantile Trust 7
Co., United States Mortgage and Trust Company, Evans, Pomroy, Cumming, Bowling Green Trust Company, Metropolitan Trust Company of the City of New York. None of the other defendants have been served nor have any of them appeared. A copy of the summons and complaint herein is hereto annexed, marked A and B respectively.

II.—On or about the 25th day of January, 1907, the said defendant, the Wabash Railroad Company, filed in the office of the Clerk of the County of New York, a petition praying for a removal of said action to the Circuit Court of the United States for the Southern District of New York, for the alleged rea- 8
son that a separable controversy existed therein between this plaintiff and said Wabash Railroad Company, a copy of which petition is hereunto annexed marked C; and said railroad company at the same time filed a bond in support of said petition, a copy of which bond is hereunto annexed marked D.

A transcript of the record of said suit was duly filed in the office of the Clerk of the Circuit Court of the United States for the Southern District of New York on or about February 4, 1907. Said transcript consisted of copies of the said summons, complaint, petition for removal, bond, and a certificate of what purported to be the approval of said bond by a Justice of the Supreme Court of the State 9
of New York.

III.—Subsequently and on or about February 15, 1907, your petitioner duly moved at a Stated Term of said Circuit Court of the United States for the Southern District of New York for an order remanding said cause to the said State Court. The motion papers then submitted to said Court consisted, besides said transcript, of a notice of said motion, a copy of which is hereunto annexed marked E., and annexed to said notice of motion, and the affidavit of this plaintiff, sworn to February 6, 1907,

10 of which affidavit a copy is hereunto annexed marked F. Said motion was heard by the Honorable E. Henry Lacombe, Circuit Judge of the United States, duly appointed in and for the Second Circuit; and subsequently, on or about the 18th day of February, 1907, he handed down an opinion, stating that said motion to remand was denied, a copy of which opinion is hereunto annexed marked G. Subsequently, an order denying said motion was signed by said Judge Lacombe and filed in the Clerk's office of said United States Circuit Court on or about February, 21, 1907. A copy of said order denying said motion is hereunto annexed marked H.

11 IV.—Your petitioner is informed by his counsel, learned in the law, and he believes that the said Circuit Judge of the United States erred in denying said motion, and that said cause should have been remanded and should be remanded to said State Court, for the reason that the said Circuit Court of the United States for the Southern District of New York had and has no jurisdiction of the same, since the parties to the controversy in said suit were not and are not citizens of different States, and since there was and is no separable controversy between this plaintiff and the said Wabash Railroad Company, and for other reasons.

Wherefore your petitioner prays: that a rule be
12 made and issue from this Honorable Court, directing the said Honorable E. Henry Lacombe, Circuit Judge of the United States for the Second Circuit, and directing the said Circuit Court of the United States for the Southern District of New York to show cause why a writ of mandamus should not issue commanding the said Judge and the said Court and each of them to remand said action to the Supreme Court of the State of New York, in and for the County of New York, and to desist from retaining jurisdiction in said action, and to desist from exercising any further jurisdiction in said action, except the entry of an order remanding

the said action, with costs; or, in the alternative, 13
for such other and further relief as to this Honorable Court may seem just and meet, and your petitioner will ever pray, &c.

JAMES POLLITZ.

NEW YORK, March 11, 1907.

ROGER FOSTER,
Attorney for Petitioner,
35 Wall Street,
New York.

ROGER FOSTER,
Of Counsel.

STATE OF NEW YORK,
County of New York,
Southern District of New York, } ss.: 14

JAMES POLLITZ, being duly sworn, deposes and says: I am the petitioner above named. The foregoing petition is true to my own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe the same to be true.

JAMES POLLITZ.

Sworn to before me this
11th day of March, 1907.

[NOTARIAL SEAL.]

John J. O'Reilly
~~Notary Public,~~
~~New York County.~~
NOTARY PUBLIC, KINGS COUNTY, 15
Certificate filed in New York County.

16 **A.**

SUPREME COURT OF THE STATE OF NEW YORK.

COUNTY OF NEW YORK.

JAMES POLLITZ,
Plaintiff,

vs.

17 THE WABASH RAILROAD COMPANY, Edward T. Jeffery, Frederic A. Delano, Edgar T. Welles, John C. Otteson, Robert C. Clowry, Robert M. Gallaway, Thomas H. Hubbard, George J. Gould, Winslow S. Pierce, John T. Terry, Joseph J. Slocum, Mercantile Trust Company, United States Mortgage and Trust Company, Henry Evans, Henry K. Pomroy, George M. Cumming, The
18 Bowling Green Trust Company, J. C. Van Blarcom, James B. Forgan and The Metropolitan Trust Company of the City of New York,
Defendants.

Summons.

TO THE ABOVE NAMED DEFENDANTS:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your

answer on the plaintiff's attorney within twenty days after service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated New York, January 15th, 1907.

STEPHEN M. YEAMAN,
Plaintiff's Attorney.
Office and P. O. address,
15 William Street,
Borough of Manhattan.
New York City.

22 **B.**

SUPREME COURT OF THE STATE OF NEW YORK,

COUNTY OF NEW YORK.

JAMES POLLITZ,
Plaintiff,

vs.

23 THE WABASH RAILROAD COMPANY, Edward T. Jeffery, Frederic A. Delano, Edgar T. Welles, John C. Otteson, Robert C. Clowry, Robert M. Gallaway, Thomas H. Hubbard, George J. Gould, Winslow S. Pierce, John T. Terry, Joseph J. Slocum, Mercantile Trust Company, United States Mortgage and Trust Company, Henry Evans, Henry K. Pomroy, George M. Cumming, The Bowling Green Trust Company, J. C. Van Blarcom, James B. Forgan and The Metropolitan Trust Company of the City of New York,
Defendants.

} Complaint.

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The plaintiff, suing in his own behalf, and in behalf of all stockholders of The Wabash Railroad Company similarly situated, complains of the above named defendants, and for cause of action alleges:

FIRST.—That the plaintiff is a citizen of the State of New York, and that the defendant The Wabash Railroad Company is, and at all the times hereinafter referred to was, a foreign consolidated corporation, duly organized and existing under the laws of the States of Missouri, Ohio, Indiana, Michigan and Illinois respectively, and at all of said times did, and now does, own and operate an extensive system of railways in all of said States. Said consolidated corporation was formed by a consolidation of the Wabash Western Railway Company, which was a foreign corporation organized under the laws of the State of Missouri in or about the month of March, 1887, and the Wabash Railway Company, which was a foreign corporation organized under the laws of the States of Ohio, Indiana and Illinois in or about the month of May, 1889, and the said consolidation was completed and carried into effect in or about the month of July, 1889. That the said defendant Wabash Railroad Company as so consolidated, remains and continues to be a corporation under the laws of each of said States, and subject to the laws thereof, as were its constituent companies, and by operation and intendment of law is a citizen of each of the States under which such constituent companies were respectively originally incorporated, and upon information and belief the plaintiff says that it has never ceased to be a corporation of, and subject to the laws of each of the said States respectively.

SECOND.—The above named defendants Edward T. Jeffery, Frederic A. Delano, Edgar T. Welles, Robert C. Clowry, George J. Gould, Winslow S. Pierce, Robert M. Gallaway, Thomas H. Hubbard and John T. Terry now are, and since the commencement of the year 1906 have been, directors of, and now constitute, and during said time have constituted, a majority of the Board of Directors of the said defendant The Wabash Railroad Company, and the defendant Joseph J. Slocum, since

about the 9th day of October, 1906, has been and now is a director of said company, and they are all citizens of the State of New York, except the defendants Delano, Gould and Jeffery; and the Wabash Railroad Company has for many years past maintained and now maintains an office in the City of New York for the transaction of the principal part of the financial business of the Company.

THIRD.—The defendant Frederic A. Delano is president of the said defendant The Wabash Railroad Company. The defendant Edward T. Jeffery is chairman of the Board of Directors of said company, which board holds its regular meetings and conducts the business of said company in the City of New York. The defendant Edgar T. Welles is vice-president of the said company; the defendant John C. Otteson is secretary and assistant treasurer of the said company.

FOURTH.—The defendants Mercantile Trust Company, the United States Mortgage and Trust Company and the Metropolitan Trust Company of the City of New York are domestic corporations duly organized by and existing under the laws of the State of New York, with their respective offices and places of business in the City of New York.

FIFTH.—The defendant Bowling Green Trust Company is a domestic corporation, duly created and organized under the laws of the State of New York, having its principal office and conducting its business at the City of New York, and the said Trust Company, together with the defendants J. C. Van Blarcom and James B. Forgan, are the trustees named and appointed in the trust deed by way of mortgage, which has been made to them as such trustees by the defendant The Wabash Railroad Company upon all its franchises and property for

the security of the payment of the principal and interest of the $200,000,000 of four per cent. bonds recently made and issued by the said Wabash Railroad Company, and hereinafter referred to. 31

SIXTH.—The defendants Henry Evans, Henry K. Pomroy and George M. Cumming are citizens of the State of New York, and are members of, and constitute a committee representing and acting for owners of the debenture mortgage bonds of the said defendant Wabash Railroad Company, which committeee is hereinafter more particularly referred to, and with the co-operation and confederation of the defendant Wabash Railroad Company published the plan set forth in Exhibit B hereto annexed; and 32
the defendants Henry Evans, Henry K. Pomroy and George M. Cumming, and each of them, have since the inception of the scheme and plan which is set forth in Exhibit B, hereto annexed, co-operated and confederated with the defendants Wabash Railroad Company and United States Mortgage and Trust Company in carrying out and accomplishing the said scheme and plan.

Upon information and belief, that the said defendants Evans, Pomroy and Cumming, constituting the committee which is above referred to, and each of them, have held and owned ever since the 15th day of August, 1906, a large amount of the debenture bonds of the defendant The Wabash 33
Railroad Company, which are hereinafter more particularly referred to, and now hold the same, unless said bonds have been deposited and exchanged under the plan set forth in Exhibit B, hereto annexed.

SEVENTH.—The defendant Wabash Railroad Company had on October 22, 1906, a capital stock issued and outstanding as follows: $24,000,000 of preferred stock and $38,000,000 of common stock, and the plaintiff is, and was, prior to the 15th day of August, 1906, the owner of one hundred thou-

sand dollars ($100,000) par value of said common stock, represented by ten certificates of one hundred shares each, said shares being each of the par value of one hundred dollars ($100), and which stock now, and prior to the 15th day of August, 1906, was and is registered and then stood and now stands in the name of this plaintiff on the books of the said company.

EIGHTH.—The said defendant Wabash Railroad Company, in or about July, 1889, created and subsequently issued debenture bonds secured by mortgage upon a part of its property, which bonds are now outstanding to the amount of $30,000,000, divided into two series: Series A, consisting of $3,500,-
000, and Series B, consisting of $26,500,000 par value. That the principal of said bonds will not mature until July, 1939. Under the terms of the said bonds and the said mortgage indenture securing the same, the interest thereon is six per cent., is payable only from and out of the net income remaining after the payment of all operating expenses, and such sums as in the judgment of the Board of Directors of said company may be necessary to maintain and renew the railroad and its appurtenances, and keep the same in good condition, and to increase its equipment to such extent as may be commensurate with its business requirements, and to pay the taxes, rentals, interest and sinking fund
instalments accruing to or to accrue on any and all mortgages existing on the said property, and to satisfy all liens and charges thereon that are or may be prior in equity to said debenture mortgage bonds; and it is further provided in said bonds and said mortgage that the said interest shall not be cumulative. No interest has ever been paid by said company on the $26,500,000 of said debenture bonds, Series B, and no interest has ever been paid upon the $3,500,000 of Series A since January, 1904.

NINTH.—That at some time during the summer of the year 1906, the exact date being unknown to

this plaintiff, negotiations were begun between the 37
defendant Wabash Railroad Company and the said defendants Henry Evans, Henry K. Pomroy and George M. Cumming, acting as the committee which is above referred to, for the purpose of agreeing upon a plan for the retirement of the said $30,000,000 of debenture mortgage bonds through the issue of other securities, both bond and stock, by the said defendant Wabash Railroad Company, and on or about the 15th day of August, 1906, after the plaintiff became a stockholder in said company, an agreement in writing was entered into by and between the said defendants Evans, Pomroy and Cumming, acting as such committee, and the defendant the Wabash Railroad Company, whereby it was 38
agreed, among other things, that in the event the stockholders and debenture mortgage bondholders should, at a meeting to be subsequently called, approve said agreement, and in the event that at least ninety-five per cent. of the holders of the debenture bonds should consent to the plan proposed in and by the said agreement, the said plan should become effective. The said agreement, among other things, provided that there should be issued by the defendant Wabash Railroad Company to the holders of each one thousand dollars ($1,000) of debenture bonds, Series A, seven hundred and seventy-five dollars ($775) par value in new four per cent. mortgage bonds. five hundred and sixty dollars 39
($560) par value in preferred stock, and five hundred and sixty dollars ($560) in common stock, and that there should be issued for each one thousand dollars ($1,000) par value of debenture mortgage bonds, Series B, seven hundred dollars ($700) par value in new bonds, five hundred dollars ($500) in preferred stock, and five hundred dollars ($500) in the common stock. The said agreement further provided that in the event no underwriting syndicate should be formed to carry out the said plan, the percentage of each class of new securities to be issued for the old debenture bonds should be in-

40 creased two per cent. on the par value of the said debenture bonds. The said agreement further provided that the said defendant The Wabash Railroad Company might elect to accept, for the purpose of carrying out the agreement, a less number of debenture bonds than ninety-five per cent. of Series B. The said agreement further provided that the committee should be reimbursed all their expenses and outlays and be paid a compensation not exceeding $60,000, by the defendant The Wabash Railroad Company.

TENTH.—Under date of August 16, 1906, the said defendants Delano and Otteson, acting respectively
41 as president and secretary of the defendant Wabash Railroad Company, by order of the Board of Directors, issued a call for a special meeting of stockholders and debenture mortgage bondholders of the said company, to be held at Toledo, Ohio, on the 22d day of October, 1906. The said meeting was called for the purpose of considering and voting and acting upon the following matters, namely:

"(1.) The creation of an issue of four per cent. fifty-year refunding mortgage gold bonds of the company to an amount not exceeding in the aggregate the principal sum of $200,000,000, to bear date July 1, 1906, with interest at the rate of four per cent. per annum, both principal and interest being
42 payable in gold coin of the United States, and to authorize the execution of a mortgage securing said bonds upon all of the railroads and properties of the company owned by it at the date of said mortgage, and thereafter acquired by the use of said bonds, or the proceeds thereof, reservation being made of a sufficient number of said bonds to refund, retire and effect the exchange of the existing mortgage bonds of the railroad company, and of all its promissory notes and equipment obligations, the remainder of said bonds to be issued only for the betterment, development, extension and equipment of the prop-

erty of the company, and for other lawful corporate purposes, as provided in the mortgage; and

(2.) The increase of the authorized preferred capital stock of the company by the amount of $16,500,000, such increase to consist of 165,000 shares of the par value of $100 each, and the increase of the authorized common capital stock of the company by the amount of $81,500,000, such increase to consist of 815,000 shares of the par value of $100 each; and

(3.) To authorize the issue of preferred and common capital stock of the company to such amounts, not exceeding, however, $16,500,000 par value of each, as may be necessary to effect the exchange hereinafter mentioned of the debenture mortgage bonds of the company; and

(4.) To authorize the exchange of debenture mortgage bonds of the company for its new bonds, hereinbefore mentioned, and its preferred and common capital stock upon terms and conditions authorized and approved by the Board of Directors; and

(5.) To authorize any and all necessary action in the premises by the Board of Directors, and by the officers of the company,

Action by the stockholders and debenture mortgage bondholders at said meeting upon all of the foregoing matters is to be dependent upon the authorization of the exchange of said debenture mortgage bonds and the exchange of the same upon the terms and conditions authorized becoming effective."

The said meeting of stockholders and debenture mortgage bondholders was held at the time and place fixed in the said notice, at which meeting the plaintiff was present by his duly authorized proxy and attorney, and after the said meeting had been

called to order and organized, and before any business was transacted, the plaintiff, by his proxy, read in the presence of all persons assembled at said meeting a notice and protest, a copy of which is hereto annexed and marked Exhibit A, and made a part of this complaint, which said notice and protest was spread upon the minutes of said meeting.

Plaintiff further alleges that his proxy duly cast plaintiff's vote against each and all of the propositions submitted to said meeting, which propositions were the same as contained in the call for said meeting hereinabove set forth, and that said negative votes were duly noted on the minutes of said meeting. A majority of the stockholders present at said meeting, and as this plaintiff is informed and believes, about ninety per cent. in amount of the outstanding debenture mortgage bondholders then present, voted to approve and to authorize the carrying out of the said plan and scheme for the retirement of the said debenture bonds, as is more particularly set forth in Exhibit B annexed hereto, but neither all the stockholders nor all of the debenture bondholders were present at the said meeting, and a large number of both stockholders and debenture bondholders have not voted in approval of the said plan and scheme, nor in any way consented to the issue of said bonds, preferred stock or common stock. That on or about the 25th day of October, 1906, the Directors of the defendant Wabash Railroad Company, at a meeting held in the City of New York, took further action with respect to the carrying out of said plan and the officers of the said defendant took proceedings to carry the same into effect, with the co-operation and confederation of the defendants Evans, Pomroy and Cumming, constituting the said bondholders' committee, and of the defendants United States Mortgage & Trust Company and Mercantile Trust Company.

ELEVENTH.—That on or about the 30th day of October, 1906, the said defendants Evans, Pomroy

and Cumming, acting as such Committee, and with the knowledge, consent and co-operation and in combination and confederation with the defendant Wabash Railroad Company, advertised in various newspapers an agreed plan for carrying out the said scheme for the exchange of the said debenture mortgage bonds of the defendant Wabash Railroad Company for new four per cent. fifty-year gold bonds and preferred and common stock of the said Company as follows, to wit: For each one thousand dollars ($1,000) par value of debenture mortgage bonds, Series A, seven hundred and ninety-five dollars ($795) of new bonds, five hundred and eighty dollars ($580) preferred stock and five hundred and eighty dollars ($580) common stock, —a total of nineteen hundred and fifty-five dollars ($1,995) of new bonds and stock for each one thousand dollars ($1,000) par value of debenture mortgage bonds, Series A, and for each one thousand dollars ($1,000) par value of debenture mortgage bonds, Series B, seven hundred and twenty dollars ($720) of new four per cent. fifty-year gold bonds, five hundred and twenty dollars ($520) of preferred stock, and five hundred and twenty dollars ($520) of common stock, a total of seventeen hundred and sixty dollars ($1,760) of new bonds and stock for each one thousand dollars ($1,000) of old bonds. A copy of the said advertisement is hereto annexed and marked Exhibit B, and made a part of this complaint.

TWELFTH.—The said plan and scheme for the issue of said new securities, bonds and stock of the defendant Wabash Railroad Company, and the contract that they should be issued and exchanged for the said debenture mortgage bonds in the proportions above stated, were made and executed, and designed and intended to be carried out, performed and executed at the City of New York, and the scheme has been in form completed and carried into effect as to more than nine-tenths of said de-

52 benture bonds by the defendant Wabash Railroad Company, its directors and officers, with the co-operation and confederation of the defendants Evans, Pomroy and Cumming, as such Committee, and of the defendants United States Mortgage and Trust Company, the Bowling Green Trust Company, Van Blarcom & Forgan, and Mercantile Trust Company, at the City of New York. The new said securities, or interim certificates therefor have been issued and the exchange has been made by the co-operation and confederation of the defendants United States Mortgage and Trust Company, Bowling Green Trust Company, Van Blarcom & Forgan with the Wabash Railroad Company and said Com-
53 mittee of Debenture Bondholders. And on information and belief plaintiff alleges that such exchanges have been made to the amount of more than ninety per cent. of said debenture bonds. The defendant Mercantile Trust Company is the registrar of the capital stock of the defendant The Wabash Railroad Company, and as such registrar countersigns the certificates for said capital stock issued, and to be issued under said plan and scheme, which stock without such registration cannot be listed on the Stock Exchange nor negotiated in the market. The defendant Mercantile Trust Company is the trustee under the mortgage securing the debenture bonds of the said Wabash Railroad Company. The
54 defendant United States Mortgage and Trust Company, by agreement with the said Committee, was and acted as the depositary named in the plan set forth in Exhibit B hereto annexed, to receive the debenture mortgage bonds from the holders thereof, and to exchange the new mortgage bonds and common and preferred stock issued therefor as stated and provided in the said contract and plan, which whole plan was and is illegal, unauthorized by law, in violation of law and *ultra vires* the said Wabash Railroad Company.

THIRTEENTH.—Art. XII., Sec. 8 of the Constitution of the State of Missouri, now and prior to August 15th, 1906, in force and effect, provides and enacts as follows: 55

"No corporation shall issue stock or bonds except for money paid, labor done or property actually received, and all fictitious increase of stock or indebtedness shall be void."

Sec. 962 of the Revised Statutes of the State of Missouri, in force and effect now, and prior to the conception of the plan and scheme herein alleged, provides and enacts as follows:

"The stock and bonds of a corporation shall be 56
issued only for money paid, labor done or money or property actually received. Any corporation may increase its capital stock or its bonded indebtedness with the consent of the persons holding the larger amount in value of the stock. * * *

But the shares of stock or bonds arising from such increase shall only be disposed of for money paid, labor done or money or property actually received. All fictitious issues or increase of stock or bonds of any corporation shall be void."

By Art. XII., Sec. 10 of the Constitution of the State of Missouri, in full force and effect now, and 57
at and before the acts of the defendants with respect to the plan and scheme herein stated, as more particularly set forth in Exhibit B hereto annexed, it is provided and enacted that "No corporation shall issue preferred stock without the consent of all of the stockholders."

That by Sec. 1050 of the Revised Statutes of the State of Missouri of 1899, in full force and effect now and at and before the acts of the defendants herein stated, it is provided that before any issue of preferred stock shall be made that subject shall be submitted to the vote of the stockholders, and

58 that no such issue shall be valid unless "all the stockholders shall consent."

And the plaintiff further alleges that all the holders of the capital stock of the said Wabash Railroad Company did not consent and have not consented to the increase of the preferred stock and the issue thereof by said company, as provided to be issued and intended to be, and actually issued under the plan and scheme herein alleged, or to any increase of such preferred stock for any purpose whatsoever.

It is enacted and provided by the laws of the State of Michigan, in full force and effect now and at and before the acts of the defendants herein com-
59 plained of, that the capital stock of corporations may be paid for either in cash or in real or personal property, and if paid for in property an itemized description thereof must be annexed to the Articles of Association, together with the value of each item taken. That the defendant Wabash Railroad Company has not complied with such statute by inserting in its Articles of Association, or otherwise stating, the value of any property taken, or to be taken, for the issue of the common and preferred stock provided for in the plan and scheme hereinbefore stated.

That by Sec. 10 of Article II. of the Constitution of the State of Illinois, and Sec. 20 of Chap. 114 of
60 the Revised Statutes of said State, in full force and effect now and at and before the acts of the defendants herein stated, it is provided as follows: "No such corporation shall issue any stock or bonds, except for money, labor or property actually received and applied to the purpose for which such corporation was organized. All stock dividends and other fictitious increase in capital stock or indebtedness of any such corporation shall be void."

That while there is no statutory regulation on the subject in the State of Indiana, the common law of that State requires that capital stock of corporations shall be paid for at par either in money, or

with property at its fair value. That the said Wabash Railroad Company has not received or been paid any money or labor, nor any property within the true intent and meaning of said Constitutions and statutes above cited, or of any of them, for the said $16,500,000 common or $16,500,000 preferred stock above described, nor for the $21,862,500 of four per cent. bonds, a part of the said issue of $200,000,000, or so much of said common and preferred stock and four per cent. bonds as have been used and applied in exchange for said debenture bonds, and that the issue thereof and the exchange thereof for said debenture bonds has added nothing to the assets and property of the Wabash Railroad Company and will only largely increase its outstanding liabilities, if held to be valid. 61 62

FOURTEENTH.—The said plan of retiring the said debenture mortgage bonds hereinbefore described, by giving in exchange therefor bonds, preferred and common stock issued for said debenture bonds, is unlawful, unauthorized, contrary to the laws of the States by which the said defendant Wabash Railroad Company is organized, is *ultra vires* the corporation, and is unjust, inequitable and injurious to the plaintiff and to all other stockholders of the said company who are similarly situated in the following particulars, to wit:

It is unauthorized by, and in violation and contravention of the laws of the States respectively under which the defendant Wabash Railroad Company is incorporated, and in which States the entire system of railroads owned and operated by it is situated; and in this—that the said debenture mortgage bonds were retired by the delivery to, and exchanging with the holders thereof of nineteen hundred and fifty-five dollars ($1,955) par value of the new securities of the said Wabash Railroad Company for each one thousand dollars ($1,000) par value of bonds Series A, and of seventeen hundred and sixty dollars ($1,760) of new securities for each 63

64 one thousand dollars ($1,000) par value of bonds Series B. That the total amount of such new bonds and preferred and common stock to be issued under the said plan for the retirement of, or in exchange for, the $30,000,000 of said debenture bonds is $53,482,500 and in addition thereto $690,000 of preferred and $690,000 of common stock for the expenses of carrying out the said plan. That in said transaction the said company did not receive either money or property or any other consideration whatsoever for $33,000,000 of its capital stock, and the said capital stock, both common and preferred, so issued and used in redeeming or retiring the said debenture bonds, is what is known and called
65 watered or fictitions stock, has added nothing to the property of the company, but has increased its liabilities in the amount named and therefore is illegal and without consideration and will, by reason of the violation of the laws of said States, subject the said defendant Wabash Railroad Company to liability to the forfeiture of its charter and franchises, to the damage and injury of its stockholders. That the said plan and scheme was and is illegal and *ultra vires* the defendant The Wabash Railroad Company in this—that it increases the preferred capital stock to the amount of $16,500,000 without the consent of all the stockholders of the Wabash Railroad Company, and in direct violation of the
66 provisions of the Constitution and Statutes of several of the domiciliary States of said Wabash Railroad Company as hereinbefore alleged in that the consent of all said stockholders as hereinbefore set forth has not been given or obtained, and particularly the consent of this plaintiff; and in that the said bonds and preferred and common stock so issued and exchanged for the said debenture bonds were not and have not been and were never intended to be paid for in money, labor or property.

That the effect of said plan and scheme is to change the said non-cumulative, non-paying deben-

ture bonds, the principal of which does not become due until the year 1939, and which are secured by debenture income mortgage on only a part of the property of the said Wabash Railroad Company, into bonds with a fixed interest charge, secured by mortgage upon all the present lines of railway and property of said company, and all property to be hereafter acquired, which interest charge if not paid will subject the entire property of said company to foreclosure and its capital stock to extinguishment; to the damage and irreparable loss of plaintiff and all other stockholders of said company. 67

That the said plan places ahead of the present common stock and subordinates the same to the new issue of $16,500,000 of preferred stock in contravention of law. Dividends of seven per cent. per annum upon such new preferred stock must be paid before the common stock held by plaintiff and others may receive anything, and as the issue of such preferred stock is without consideration it dilutes that class of stock and depreciates the value and security of both the preferred and common stock outstanding at the time of the acts complained of. 68

That the issue of $16,500,000 par value of common stock without any consideration dilutes and makes less valuable the old common stock.

That the interest rate of four per cent. upon the $21,862,500 new mortgage bonds, which the defendant Wabash Railroad Company has issued or will issue under the plan hereinbefore set forth, will, during the next thirty-three years, the life of the present debenture mortgage bonds, amount to $28,858,500, without compounding, an amount nearly sufficient to retire and pay at their maturity in 1939 the $30,000,000 of outstanding debenture bonds, and that the said interest charge on the said $21,862,500 new bonds will be taken out of the revenues of the property and the property impoverished and impaired to that extent; whereas, if the said debenture bonds are allowed to remain outstanding, all 69

70 of the requirements of the said defendant Wabash Railroad Company for extensions, improvements, new equipment and other betterments may be met out of the net earnings of the said Company, with no obligation to pay interest on the said outstanding debenture mortgage bonds, unless there shall be a surplus of net earnings over and above all the requirements of the Company for the matters and purposes aforesaid.

FIFTEENTH.—That notwithstanding the proposition to issue $53,482,500 of new mortgage bonds and stock in exchange for the debenture bonds, it is proposed by the said plan to keep the said debenture
71 bonds alive as additional security for the said new mortgage bonds until all of said debenture bonds shall have been exchanged or retired.

That at none of the times herein stated have the said debenture mortgage bonds, either Series A or B, been worth nor have the same sold in the open market for their par value. That during the year 1906 the highest and lowest prices at which the Series A bonds have sold were 98 and 87½ respectively, and that on August 15, 1906, the date of the agreement between The Wabash Railroad Company and the Committee herein referred to, the Series B bonds sold at 82, and on October 22, 1906, the date of the stockholders' meeting, Series B bonds sold at
72 80½, and at about the same price on October 30, 1906, the date of the publication of the plan for exchange herein referred to, and on December 22, 1906, sold at 75, and on December 31, 1906, they sold at 74½. That the total market value of the $26,500,000 of Series B bonds at the about prices at which they have lately sold, viz., 75 cents on the dollar, is $19,875,000, while under the plan and scheme herein referred to, the said Wabash Railroad Company has issued, or will issue in exchange therefor new four per cent. bonds and preferred and common stock to the amount of $46,640,000, and for the $3,500,000 of Series A bonds, which during the year

1906 have continuously sold at less than par, and as 73
low as 87½, said Wabash Railroad Company has issued, or will issue, $6,842,500 of new four per cent. bonds and preferred and common stock. That the defendant Wabash Railroad Company, on December 22, 1906, declared operative the plan and scheme for the exchange of new bonds and stocks for the debenture mortgage bonds in this complaint and in Exhibit B hereto annexed more fully described, and a notice to that effect has been published by the defendants Evans, Pomroy & Cumming, and a further notice has been published by said Committe, dated December 31, 1906, in which it is stated that the said plan having been declared and become operative, interim certificates represent- 74
ing the new securities issued thereunder have been delivered to the United States Mortgage and Trust Company for distribution by it after that date to holders of the receipts of that Company issued upon the deposit of the debenture mortgage bonds.

On information and belief the plaintiff alleges that the new four per cent. mortgage bonds and the preferred and common stock of The Wabash Railroad Company, or interim receipts therefor, in an amount sufficient to carry the said plan and scheme into effect, so far as the same has been assented to by depositing debenture mortgage bondholders, have been delivered to the defendant United States Mortgage and Trust Company for the purpose 75
of effecting the exchange of securities pursuant to the plan and scheme hereinbefore referred to, and that interim certificates representing such bonds and preferred and common stock respectively have been delivered to said depositing bondholders in exchange for the debenture bonds so deposited by them.

SIXTEENTH.—That the annual report of the said Wabash Railroad Company for the year ending June 30, 1906, shows a surplus only of $509,332.79 which could be applicable to the payment of inter-

76 est upon the debenture mortgage bonds, which surplus is equal only to about one and seven-tenths per cent. upon the said $30,000,000 debenture bonds, but as interest would first have to be paid in full at six per cent. upon the $3,500,000 of Series A bonds, there would remain only about $300,000 applicable to interest upon the $26,500,000 Series B bonds, or about one and one-eighth per cent. (1 1/8%).

That the Directors of the defendant Wabash Railroad Company, at a meeting held on or about December 22, 1906, took action declaring in effect that there were no net earnings of said Company available for the payment of interest upon the said debenture mortgage bonds, and directing that no pay-
77 ment of interest thereon be made. That notwithstanding such action of passing and defaulting the interest on the said debenture bonds because the same had not been earned, the directors of the defendant Wabash Railroad Company authorized the payment of the coupons due January 1, 1907, on the new four per cent. mortgage bonds issued under the plan and scheme aforesaid, in exchange for the debenture bonds, and said coupon interest on the new bonds is being paid by the defendant United States Mortgage and Trust Company from funds furnished by the Wabash Railroad Company, to the holders of receipts issued by the United States Mortgage and Trust Company on the deposit of the debenture
78 bonds, and the said Wabash Railroad Company, unless restrained by order this Court, will pay the subsequently maturing instalments of interest coupons on said new four per cent. mortgage bonds.

SEVENTEENTH.—On information and belief the plaintiff alleges that the defendant George J. Gould and several of the other defendants who are directors of the Wabash Railroad Company were large holders of the debenture mortgage bonds of the Wabash Railroad Company at the time of the publication of the plan and scheme set forth in Exhibit B hereto annexed, and that they have deposited

the said bonds so owned by them with the United 79
States Mortgage and Trust Company, and have received or will receive the new bonds and preferred and common stock issued under said plan. That the defendant Metropolitan Trust Company was, at the time of the publication of the plan and scheme set forth in Exhibit B hereto, the owner and holder of $5,435,000 of said debenture mortgage bonds Series B of the defendant Wabash Railroad Company, which said bonds have been deposited with the United States Mortgage and Trust Company under the plan and scheme herein set forth, and the defendant Metropolitan Trust Company of the City of New York has received, or will receive, the new bonds and preferred and common stock, or 80
interim certificates therefor issued under the said plan and scheme. That the said defendant directors of the said Wabash Railroad Company, who were holders of such debenture bonds, the Metropolitan Trust Company of the City of New York and the said Bondholders' Committee will be unduly and inequitably benefited if the said scheme for the retirement of said debenture bonds be upheld and decreed valid.

EIGHTEENTH.—Plaintiff further alleges that by reason of the said unlawful combination, plan and agreement between said Wabash Railroad Company and said Debenture Bondholders' Committee, 81
referred to in this complaint and Exhibit B hereto annexed, there have been issued and will be placed upon the market, if the said plan, scheme and combination be not declared and adjudged invalid, a large amount of unlawful and invalid bonds and preferred and common stock of said Wabash Railroad Company, and plaintiff and other stockholders of said Company thereby affected will, as plaintiff is advised and believes, be obliged to resort to a multiplicity of suits to avoid and defeat said unlawful and invalid bonds and stock created, issued and

incurred by said Railroad Company, and said Railroad Company itself may be directed and required to observe and obey the said laws of the said several States of its being, and its own organic and fundamental laws, and be necessitated to bring and maintain, as this plaintiff is advised and believes and charges, a multiplicity of suits to avoid and escape the force and effect of said unlawful and invalid but apparent liabilities, bonds and stock by it so incurred and issued, and the said Wabash Railroad Company will on that account be put to great expense and loss by reason thereof.

NINETEENTH.—The said defendants herein named as directors or officers of the Wabash Railroad Company have been such officers and directors respectively at all the times since August 1, 1906, except defendant Slocum, who was elected a director October 9, 1906, and have acted and exercised their powers as such in ordering, assisting and participating in doing the acts and things herein alleged, to carry into effect the said plan and scheme, and are still such directors and officers respectively, in full and complete command and control of the said Wabash Railroad Company and its affairs, with interests and motives adverse to and against the institution, by the said Wabash Railroad Company, of any action or legal proceedings to obtain the relief herein demanded; and any request or demand by the plaintiff or any other stockholders that said Wabash Railroad Company commence such action or proceedings would be useless and futile. That the defendants herein, except the Metropolitan Trust Company, during all the times herein stated, have proceeded to do the acts and to carry into effect the plan and scheme herein alleged and complained of, with full notice and knowledge of plaintiff's protest against the same, and of all the objections thereto and the illegality thereof.

Wherefore, the plaintiff demands judgment against the defendants a follows: 85

I.—That the plan and scheme for the issue and delivery of fifty-year four per cent. gold mortgage bonds and the preferred and common stock of the Wabash Railroad Company in exchange for, or retirement of the debenture mortgage bonds Series A and B of said Wabash Railroad Company, as set forth in this complaint and Exhibit B hereto attached, be decreed and adjudged to be *ultra vires* the said Wabash Railroad Company, illegal and void, and that all said bonds and preferred and common stock issued and used or applied by said Wabash Railroad Company for the purposes stated in said plan and scheme be decreed and adjudged il- 86
legal, void and of no effect; and that the defendants Wabash Railroad Company, United States Mortgage and Trust Company, Bowling Green Trust Company, J. C. Van Blarcom and James B. Forgan and each of them be decreed and ordered to re-exchange and redeliver any and all of the debenture mortgage bonds of the Wabash Railroad Company, Series A and B, held by them or any of them, which have been by the owners thereof exchanged for new mortgage bonds, preferred and common stock of the Wabash Railroad Company under the plan and scheme in this complaint described, to the holders of said new four per cent. mortgage bonds, preferred and common stock, in the same proportions 87
as they were issued in exchange for the debenture mortgage bonds under said plan and scheme, to the end that the depositing debenture bondholders, or their assigns, the holders of said new bonds and preferred and common stock may be restored to their original position as holders of the debenture mortgage bonds.

II.—And in default of the relief above prayed for:

That the defendants who are officers and directors of the defendant The Wabash Railroad Com-

88 pany, to wit, Edward T. Jeffery, Frederic A. Delano, Edgar T. Welles, Robert C. Clowry, George J. Gould, Winslow S. Pierce, Robert M. Gallaway, Thomas H. Hubbard, John T. Terry and Joseph J. Slocum, and each of them, and the defendant United States Mortgage and Trust Company, be adjudged and decreed to restore and return to the said Wabash Railroad Company all of the fifty-year four per cent. mortgage bonds, and all of the preferred and common stock of the defendant The Wabash Railroad Company, which have been or may hereafter be issued and used in exchange for such debenture bonds. And in the event that for any reason they shall be unable to do so, that they, and
89 each of them, be ordered and decreed to pay into the treasury of The Wabash Railroad Company the aggregate par value of such bonds and common and preferred stock so issued, and that the defendant The Mercantile Trust Company be ordered and adjudged to return and deliver to said Wabash Railroad Company all of the shares of common and preferred stock so issued which have been or may be countersigned by said Trust Company, and used in exchange for such debenture bonds, and in default of said Mercantile Trust Company being for any reason unable to do so, to pay into the treasury of the said Wabash Railroad Company the par value of such common and preferred stock so counter-
90 signed, issued and used. And in default of such relief, that the said defendants and each of them be ordered to account for and pay into the treasury of the Wabash Railroad Company so much of the par value of the said bonds and stocks so issued and exchanged for the said debenture bonds as may be found to exceed the actual market value of the said debenture bonds at the time such exchange was made.

And that the said defendant The Metropolitan Trust Company of the City of New York be ordered and adjudged to return to said Wabash Railroad Company, all of the bonds and common and pre-

ferred stock of the Wabash Railroad Company so 91
received by it in exchange for $5,435,000 of said debenture bonds, and in default of being unable for any reason to so return the said bonds and stock, that it be adjudged and decreed to pay into the treasury of the said Wabash Railroad Company so much of the par value of such bonds and preferred and common stock so received by it in exchange for the said debenture bonds as may be found to exceed the actual market value of such debenture bonds at the time the exchange was made.

III.—That pending this action, and until the final determination thereof, the defendant The Wabash 92
Railroad Company, its officers, agents, attorneys and servants, be enjoined and restrained from any further proceedings to carry into effect the said plan and scheme of exchanging its bonds, common and preferred stock for its outstanding bonds, which have not yet been deposited or exchanged in pursuance of such plan.

IV.—That pending this action, and until the final determination thereof, the defendant Wabash Railroad Company be enjoined and restrained from paying any interest upon any of its fifty-year four per cent. mortgage bonds which have been issued or may hereafter be issued in exchange for said de- 93
benture mortgage bonds under the plan and scheme in this complaint alleged and set forth, and that said defendant be further enjoined and restrained from transferring upon its books any certificates representing any of its preferred or common stock which have been, or may hereafter be issued in exchange for the debenture bonds under said plan and scheme; and that the said defendant be further enjoined and restrained from paying any dividends upon any part of its preferred stock issued in exchange for the debenture mortgage bonds under the said plan and scheme; and that the said defendant

94 Wabash Railroad Company, its officers, agents, servants and attorneys, be enjoined and restrained from receiving or counting, or permitting to be received and counted, any votes at any meeting of the stockholders of said company, on the shares of preferred and common stock issued in exchange for the said debenture mortgage bonds under said plan and scheme.

V.—That pending this action, and until the final determination thereof, the defendant Mercantile Trust Company be enjoined and restrained from countersigning as registrar any certificates repre-
95 senting the preferred or common stock of the defendant Wabash Railroad Company which have been or may be hereafter issued in further carrying out the plan and scheme in this complaint set forth, and be further enjoined and restrained from countersigning any certificates representing preferred or common stock which may be hereafter issued by the defendant Wabash Railroad Company as a reissue or transfer of the certificates for said preferred and common stock issued under said plan and scheme.

VI.—That the defendants Jeffery, Delano, Welles, Clowry, Gould, Pierce, Gallaway, Hubbard, Terry and Slocum, who are directors of the defend-
96 ant Wabash Railroad Company; and the defendant John C. Otteson, who is secretary and assistant treasurer of said corporation defendant, and each of them, be ordered to account to the said Wabash Railroad Company, and to pay into the treasury of said company all moneys which have been, or may be hereafter paid as interest upon any or all of the fifty-year four per cent. mortage bonds herein referred to, which have been or may be issued in exchange for the debenture mortgage bonds of the said Wabash Railroad Company under the plan and scheme set forth in this complaint and Exhibit B.

And that the plaintiff have such other and fur-

ther order and relief as may be equitable and 97
proper.

STEPHEN M. YEAMAN,
Attorney for Plaintiff.
Office and P. O. address,
15 William Street,
Borough of Manhattan,
New York City

STATE OF NEW YORK, }
County of New York, } ss.:

JAMES POLLITZ, being duly sworn, says: That he is the plaintiff in the above entitled action, that he has read the foregoing complaint, and that the same is true of his own knowledge, except as to the mat- 98
ters therein stated to be alleged upon information and belief; and as to those matters he believes it to be true.

JAMES POLLITZ.

Sworn to before me this 16th }
day of January, 1907. }
JOHN J. O'REILLY,
Notary Public,
Kings County.
Certificate filed in New York County.

Exhibit "A." 99

TO THE STOCKHOLDERS AND DEBENTURE MORTGAGE BONDHOLDERS OF THE WABASH RAILROAD COMPANY, IN SPECIAL MEETING ASSEMBLED AT TOLEDO, OHIO, OCTOBER 22, 1906, PURSUANT TO A CALL SIGNED BY THE PRESIDENT AND SECRETARY OF SAID COMPANY, DATED NEW YORK, AUGUST 16, 1906:

TAKE NOTICE:

The undersigned, the holder of one thousand shares of the common capital stock of the Wabash

100 Railroad Company, hereby protests against any action being taken at this meeting, or any adjournment thereof, by the stockholders or debenture mortgage bondholders of that Company, which attempts or purports to authorize, in any manner, or to any extent, the carrying out of the plan to issue new four per cent. fifty-year mortgage bonds and preferred and common stock of the Company, in exchange for the debenture mortgage bonds as set forth in the call for this meeting, and the explanatory circular issued by the President and Secretary of said Company under date of September 8, 1906, for the following reasons, among others:

101 1. In the circular issued by the said Company under date of September 8, 1906 ,it is proposed to issue to the holders of $30,000,000 mortgage debenture bonds, upon which interest is payable only if earned, and upon $26,500,000 of which no interest has ever been paid, $21,262,500 of the proposed new four per cent. fifty year mortgage bonds, $15,210,000 of the preferred stock and $15,210,000 of common stock, or new bonds and stock to the amount of $51,682,500 to retire the $30,000,000 of debenture bonds, and to the extent of $21,682,500 the new stock will be fictitious, without consideration and void.

102 2. The Constitution of the State of Missouri provides that capital stock can only be issued for money paid, labor done or property actually received, and that all fictitious increase of stock is void, and the laws of the other states wherein said Company is incorporated, to wit: Ohio, Indiana, Illinois, Michigan and Iowa provide that capital stock can only be issued at par for money or property at its fair value.

3. The said proposition alters the position of the present stockholders in the following respects, among othesr:

A. The changing of a non-cumulative, non-paying bond, the principal of which does not become due until 1939, into a bond with a fixed interest charge, which if not paid, will subject the property to foreclosure and the capital stock to extinguishment. 103

B. It places ahead of the present common stock $15,210,000 of preferred stock, upon which dividends of seven per cent. must be paid before the common stock may receive anything, and to the extent of $6,472,500 the proposed issue of preferred stock will be without any consideration, thus diluting that class of stock and depreciating the value of both the preferred and common stock. 104

C. It is proposed to issue $15,210,000 of common stock without consideration, thereby diluting and making less valuable the present common stock.

4. The debenture mortgage bondholders are disqualified to vote upon this proposition, which contemplates their advantage and enrichment to the injury of the present stockholders, and changing the position of the debenture mortgage bonds from a non cumulative, non-paying security to that of a foreclosable mortgage bond with a definite fixed charge.

I respectfully request that the foregoing protest be entered in full upon the minutes of this meeting, and it is herewith handed to the Secretary for that purpose. 105

JAMES POLLITZ,
By his Proxy and Attorney,
STEPHEN M. YEAMAN.

Toledo, Ohio, October 22, 1906.

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Exhibit "B."

TO THE HOLDERS OF DEBENTURE MORTGAGE BONDS, SERIES A AND SERIES B, OF THE WABASH RAILROAD COMPANY:

The undersigned, acting as a Committee of Debenture Mortgage Bondholders, Series B of The Wabash Railroad Company, have been engaged for some time in negotiating an arrangement whereby the Railroad Company may exchange and retire its Debenture Mortgage Bonds, provide for the refunding and retirement of all of its bonded indebtedness, funded notes and equipment obligations and for the
107 capital expenditures required for the development, improvement and extension of its property to meet the requirements of its increased business and the standards of its competitors. As the result of such negotiations, the Committee has concluded an agreement with the Railroad Company embodying the following

PLAN:

The Railroad Company has authorized by action of its Stockholders and Debenture Mortgage Bondholders, at a special meeting held on October 22, 1906, the creation of an issue of refunding bonds to be known as its First Refunding and Extensions
108 Mortgage Fifty-Year Four Per Cent. Gold Bonds, to an amount not exceeding in the aggregate the principal sum of $200,000,000 at any one time outstanding, to be dated July 1, 1906, to mature July 1, 1956, and to bear interest at the rate of four per cent. per annum, payable semi-annually on the first days of January and July in each year. All of said bonds are to be secured by a mortgage, similarly authorized and approved, upon all of its railroad and property, and are to be issued for the purpose of refunding and retiring all of the present bonded indebtedness of the Railroad Company, including the exchange of its Debenture Mortgage Bonds, as

hereinafter mentioned, as well as retiring its 109
funded notes and equipment obligations, paying bonds of other companies assumed or guaranteed by it, and providing funds for the development of the railroads and properties of the Railroad Company.

The Railroad Company has also authorized the increase and issue of its preferred and common capital stock in amounts necessary to carry out and complete the exchange of its Debenture Mortgage Bonds upon the terms hereinafter mentioned.

TERMS OF EXCHANGE.

Holders of debenture mortgage bonds of the Railroad Company who shall, on or before November 30, 1906, deposit their bonds, duly assigned for transfer, with the United States Mortgage and Trust Company, at its office, No. 55 Cedar street, New York City, will receive therefor negotiable deposit receipts entitling the holders thereof to receive, upon the surrender thereof and upon the due execution of the proposed mortgage and the issue of the bonds secured thereby and upon the issue of preferred and common capital stock of the Railroad Company in such amounts as may be necessary for the purposes of the exchange, the following securities: 110

For each $1,000, par value, of Debenture Mortgage Bonds, Series A, $795, par value of new bonds, $580, par value, in preferred stock, and $580, par value, in common stock, of the Railroad Company. 111

For each $1,000, par value, of Debenture Mortgage Bonds, Series B, $720, par value, in new bonds; $520, par value, in preferred stock, and $520, par value, in common stock of the Railroad Company.

Scrip will be issued in adjustment of fractional amounts.

The new bonds will bear interest from July 1, 1906.

112 The foregoing plan of exchange is set forth in the agreement between the undersigned and the Railroad Company above mentioned, to which all bondholders depositing their bonds become parties and wherein it is provided that depositors are bound by all of the provisions and limitations therein contained. Copies of this agreement may be obtained by bondholders upon application at the office of the United States Mortgage and Trust Company, No. 55 Cedar Street, New York City.

In case at least 95 per cent. in face value of the Debenture Mortgage bonds, Series B, shall not be deposited for exchange, as aforesaid (unless the Railroad Company shall elect to accept the amount
113 of bonds which shall be so deposited as sufficient for the purpose of carrying out the exchange), then the deposited bonds are to be returned without charge upon surrender of the deposit receipts issued with respect thereof.

Upon the issue of the new bonds and preferred and common stock, the same will be delivered by the Railroad Company to the United States Mortgage and Trust Company in exchange for the Debenture Mortgage Bonds deposited with the Trust Company, which bonds shall be pledged under the new mortgage and kept alive as therein provided until the entire issue of Debenture Mortgage Bonds shall have been acquired and exchanged. The new
114 securities so received by the Trust Company will be delivered by it to the holders of its deposit receipts upon the surrender thereof.

In case the new securities, or interim certificates representing the same, shall not be issued and ready for delivery to the holders of deposit receipts on or prior to December 31, 1906, the deposited Debenture Mortgage Bonds will be returned without charge to the holders of deposit receipts upon the surrender thereof.

If the plan for the exchange of Debenture Mortgage Bonds shall become operative, all moneys heretofore received by the undersigned from holders of

Debenture Mortgage Bonds under the terms of the agreement constituting the undersigned a Committee will be returned to the persons from whom the same were received. 115

The foregoing plan was submitted at a special meeting of the Stockholders and Debenture Mortgage Bondholders of the Railroad Company held on October 22, 1906, at which meeting there was the largest representation of Debenture Mortgage Bonds and stock in the history of the Railroad Company, with only one exception (in 1892), and was duly authorized and approved, about 90 per cent. of all outstanding Debenture Mortgage Bonds voting in favor of its adoption without any dissenting votes.

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The Committee believes that the plan secures to Debenture Mortgage Bondholders a most desirable result, extending, as it does, their interest over the entire property of the Railroad Company on the basis of a fixed return upon their investment, and affording to them as Stockholders an interest in the surplus revenues of the Company, as well as in the future development and growth of the property through the application of resources provided by the new bonds.

The Committee, as well as the individual members, have agreed to deposit for exchange all Debenture Mortgage Bonds, owned or controlled by them, and recommend to Debenture Mortgage Bondholders the prompt deposit and exchange of their bonds. 117

HENRY EVANS,
HENRY K. POMROY,
GEORGE M. CUMMING,
Committee.

WILLIAM C. TRULL,
Counsel.
DAVID RUMSEY,
Secretary.

New York City, October 30, 1906.

118 **C.**

SUPREME COURT OF THE STATE OF NEW YORK,

COUNTY OF NEW YORK.

JAMES POLLITZ,
Plaintiff,

vs.

THE WABASH RAILROAD COMPANY, Edward T. Jeffery, Frederic A. Delano, Edgar T. Welles, John C. Otteson, Robert C. Clowry, Robert M. Gallaway, Thomas H. Hubbard, George J. Gould, Winslow S. Pierce, John T. Terry, Joseph J. Slocum, Mercantile Trust Company, United States Mortgage and Trust Company, Henry Evans, Henry K. Pomroy, George M. Cumming, The Bowling Green Trust Company, J. C. Van Blarcom, James B. Forgan and The Metropolitan Trust Company of the City of New York,
Defendants.

Petition of defendant The Wabash Railroad Company to remove this cause into the Circuit Court of the United States for the Southern District of New York.

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120

The petition of The Wabash Railroad Company, one of the defendants in the above entitled action, respectfully shows to this Honorable Court:

That this action was commenced against this petitioner by the service of summons and complaint

therein on the 23d day of January, 1907, by delivery 121
of the same within the County of New York, to John C. Otteson, the secretary of this petitioner;

That said action is of a civil nature in equity and that the said James Pollitz is the sole plaintiff therein;

That said plaintiff was at the time of the commencement of said action in this court and still is a citizen of the State of New York; and that your petitioner was at the time of the commencement of said action in this court and still is a consolidated railroad corporation duly incorporated, organized and existing under and by virtue of the laws of the States of Ohio, Michigan, Indiana, Illinois and Missouri, and is a citizen of the State of Ohio, and is 122
not a citizen or resident of the State of New York;

That said plaintiff in his complaint herein claims, in substance, that this petitioner, during the summer of the year 1906, entered into certain negotiations for the purpose of agreeing upon a plan for the retirement of the debenture mortgage bonds of this petitioner through the issue of other securities, both bonds and stock, and that the plan covered by such agreement was subsequently authorized and approved by the stockholders and debenture mortgage bondholders of this petitioner at a special meeting held at Toledo, Ohio, on October 22, 1906, in pursuance of published notice, at which meeting the issue of certain new bonds and preferred and 123
common stock of this petitioner and the exchange of certain of said new bonds, preferred and common stock of this petitioner for its debenture mortgage bonds was authorized and approved;

That said plan of exchange was thereafter made public through the publication of the notice, copy of which is attached to the complaint herein and marked "Exhibit B";

That said plan of exchange is unlawful, unauthorized, contrary to the laws of the States in which this petitioner was organized, is *ultra vires* and unjust, inequitable and injurious to the plaintiff, who

124 claims to be the owner of one thousand shares of the common capital stock of this petitioner;

That the new bonds and the preferred and common stock of this petitioner, or interim receipts therefor, in an amount sufficient to carry the said plan into effect, so far as the same has been assented to by debenture mortgage bondholders, have been delivered to the depositing bondholders in exchange for the debenture bonds deposited by them; and that by reason thereof there have been issued and will be placed upon the market, if the said plan be not declared and adjudged invalid, a large amount of unlawful and invalid bonds and preferred and common stock of this petitioner;

125 That the plaintiff, in his complaint herein, demands that the plan and scheme for the issue and delivery of the new bonds and the preferred and common stock of this petitioner in exchange for or retirement of its debenture mortgage bonds be decreed and adjudged to be *ultra vires*, illegal and void; and that all said bonds and preferred and common stock issued and used or applied by this petitioner for the purposes stated in said plan and scheme be decreed and adjudged illegal, void and of no effect; and further, that pending this action and until the final determination thereof, this petitioner, its officers, agents, attorneys and servants, be enjoined and restrained from taking any further pro-
126 ceedings to carry into effect the said plan and from paying any interest upon any of its new bonds which have been issued thereunder, and from transferring upon its books any certificates representing any of its preferred or common stock issued under said plan and from paying any dividends upon any part of its preferred stock issued under said plan and from permitting to be received and counted any votes with reference to the shares of preferred and common stock so issued at any meeting of the stockholders of this petitioner.

That the plaintiff, in his complaint alleges that the defendants Edward T. Jeffery, Frederic A.

Delano, Edgar T. Welles, Robert C. Clowry, 127
George J. Gould, Winslow S. Pierce, Robert M. Gallaway, Thomas H. Hubbard and John T. Terry are directors, and constitute a majority of the Board of Directors of this petitioner; that the defendant Edward T. Jeffery is chairman of the Board of Directors of this petitioner; that the defendant Frederic A. Delano is president, the defendant Edgar T. Welles is vice-president, and the defendant John C. Otteson is secretary and assistant treasurer of this petitioner.

Said complaint also alleges that the defendant the Mercantile Trust Company is the registrar of the capital stock of this petitioner, and that said stock cannot be listed without registration or nego- 128
tiated in the market; that said defendant is also the trustee under the mortgage securing the debenture bonds of this petitioner.

Said complaint also alleges that the defendant United States Mortgage and Trust Company was and acted as the depositary named in the plan set forth in the published notice, copy of which marked Exhibit B is annexed to said complaint.

Said complaint also alleges that the defendants, Henry Evans, Henry K. Pomroy and George M. Cumming, are members of and constitute a committee representing owners of debenture mortgage bonds of this petitioner, which committee has co-operated and confederated with this petitioner and 129
with the defendant United States Mortgage and Trust Company in carrying out and accomplishing the said plan, and has published the notice set forth in Exhibit B annexed to said complaint.

That the defendants Bowling Green Trust Company, J. C. Van Blarcom and James B. Forgan, are the trustees named in the mortgage made to them by this petitioner to secure the new bonds issued in exchange for debenture mortgage bonds under said plan.

Said complaint also alleges that the said plan for the exchange of said debenture mortgage bonds of

130 this petitioner has been completed and carried into effect as to more than nine-tenths of said debenture mortgage bonds by this petitioner, its directors and officers, with the co-operation and confederation of the defendants Evans, Pomroy and Cumming, as a committee, and of the defendants United States Mortgage and Trust Company, Bowling Green Trust Company, J. C. Van Blarcom and Forgan, and The Mercantile Trust Company; and that the new securities, or interim certificates therefor, have been issued and the exchange has been made by the co-operation and confederation of the defendants United States Mortgage and Trust Company, Bowling Green Trust Company, Van Blarcom and For-
131 gan, with this petitioner and said committee.

Said complaint further alleges upon information and belief, that such exchanges have been made to the amount of more than ninety per cent. of said debenture bonds.

Said complaint also alleges on information and belief, that certain of the defendants, who are directors of this petttioner, were large holders of debenture mortgage bonds, and that The Metropolitan Trust Company was the owner and holder of $5,435,000 of said debenture mortgage bonds, and that said directors and said Metropolitan Trust Company will be unduly and inequitably benefited if the plan for the retirement of said debenture
132 mortgage bonds be upheld and decreed valid.

That the plaintiff in his complaint herein demands, as an alternative relief to the main relief prayed for by him against this petitioner and in default of said main relief and in case the Court shall hold and decree that he is not entitled to said main relief, to have an accounting by the defendants who are officers and directors of The Wabash Railroad Company and by the defendant United States Mortgage and Trust Company and the defendant The Mercantile Trust Company in respect to the new bonds and common and preferred stock

of this petitioner which have been issued under said 133
plan of exchange;

That your petitioner disputes the claim against it as set forth by the plaintiff in his complaint, and denies that the plaintiff is entitled to the judgment and relief prayed for against this petitioner or to any judgment or relief against it; and this petitioner alleges that the fundamental and primary controversy, as set forth in said complaint, is whether or not the plan for the exchange of the debenture mortgage bonds by this petitioner, the authorization and creation by it of the new securities in the said complaint set forth and the issue of the same by it for the purpose of carrying said plan into effect is, as alleged in said complaint, illegal, unlawful, void 134
and prohibited by the charter of this petitioner and the laws under which it is incorporated; and whether said new securities are, as alleged in said complaint, invalid and void; and that such controversy is a separable and distinct controversy between the plaintiff and this petitioner;

That a complete determination of said controversy can be had without the presence of any of the defendants in this action other than this petitioner; and that all of said other defendants are neither indispensable nor necessary parties to the complete determination of said controversy.

That the foregoing controversy, which is solely between the plaintiff and the petitioner, must be determined before any other controversy alleged in the 135
complaint can be considered and determined; and that said controversy between the plaintiff and this petitioner, as above set forth, is separate and distinct from any other or further controversy;

That said fundamental and primary controversy herein between the plaintiff and this petitioner is a controversy wholly between citizens of different States—to wit: Between the plaintiff, a citizen of

136 the State of New York, and this petitioner, a citizen of the State of Ohio.

That the matter in dispute in this action exceeds the sum of two thousand dollars, exclusive of interest and costs.

Your petitioner further shows that this petition is made and filed before this petitioner is required by the laws of the State of New York or the rule of this Honorable Court to answer or plead to the complaint of the plaintiff, and that it is desired by your petitioner, one of the defendants herein, to remove said cause from this Honorable Court to the Circuit Court of the United States for the Southern District of New York in accordance with the provisions of
137 the Acts of Congress of the United States in that behalf made and provided:

That no special bail was or is required in said action.

Your petitioner files and offers herein a a bond with good and sufficient security in the penal sum of $500, conditioned as required by the Act of Congress in that behalf made and provided, for entry in the Circuit Court of the United States for the Southern District of New York, on the first day of its next session, a copy of the record in this suit, and to pay all costs that may be awarded in said Circuit Court of the United States if said Court shall hold that this suit was wrongfully or improperly removed
138 thereto.

Your petitioner further prays that the said bond may be accepted as good and sufficient, and that this Honorable Court will make this order for the removal of this suit into the Circuit Court of the United States, to be held in and for the Southern District of New York, in which district this suit is pending, pursuant to the Act of Congress in such case made and provided, and cause the record herein to be removed into the said Circuit Court of the

United States, and that no further or other pro- 139
ceedings may be had in said cause in this court.

And your petitioner will ever pray.

Dated New York, January 25, 1907.

PIERCE & GREER,
Attys. for the Deft. The Wabash Railroad Company.
Office and P. O. address,
120 Broadway,
Borough of Manhattan,
New York City.

STATE OF NEW YORK, }
County of New York, } ss.: 140

JOHN C. OTTESON, being duly sworn, deposes and says that he is the secretary of the defendant The Wabash Railroad Company; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge, except as to those matters therein said to be alleged on information and belief, and that as to those matters he believes it to be true.

JOHN C. OTTESON.

Sworn to before me this 25th }
day of January, 1907. }

CHARLES J. HOEHNLE,
[SEAL.] Notary Public,
Kings County. 141
Certificate filed in New York Co.

142

D.

KNOW ALL MEN BY THESE PRESENTS, that we, the Wabash Railroad Company, as principal, and American Surety Company of New York, of 100 Broadway, New York, as surety, are held and firmly bound unto James Pollitz in the sum of five hundred ($500) dollars to be paid to the said James Pollitz, executors, administrators or assigns; to which payment well and truly to be made and done, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, firmly by these presents.

143 Sealed with our seals the 24th day of January, A. D., 1907.

WHEREAS, the above bounden The Wabash Railroad Company has petitioned the Supreme Court of New York County, State of New York, for the removal of a cause pending wherein James Pollitz is plaintiff, and the Wabash Railroad Company *et al.* are defendants, to the Circuit Court of the United States for the Southern District of New York, pursuant to the provisions of the Acts of Congress in that behalf;

144 NOW, THEREFORE, the condition of the above obligation is such, that if the above bounden The Wabash Railroad Company shall enter in such Circuit Court, on the first day of its next session, a copy of the record in such suit, copies of the process against petitioner, and of all the pleadings, depositions, testimony and other proceedings in the cause, and shall pay all costs that may be awarded by said Circuit Court, if said Court shall hold that such suit was wrongfully or improperly

removed thereto, then this obligation shall be null 145
and void, otherwise of force.

THE WABASH RAILROAD COMPANY,
By E. T. JEFFERY,
[SEAL.] Chairman of the Board.
AMERICAN SURETY COMPANY OF NEW YORK,
By LEWIS B. REED,
Vice-President.
CORTLANDT S. VAN RENSSELAER,
[L. S.] Attorney.

In the presence of
JOHN C. RONALDSON,
THOMAS J. SAVAGE.

STATE OF NEW YORK, } 146
County of New York, } ss.:

On the 24th day of January, in the year 1907, before me personally came E. T. Jeffery, to me known, who being by me duly sworn, did depose and say: that he resided in New York City; that he is the Chairman of the Board of The Wabash Railroad Company, the corporation described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

S. D. FRICKE, 147
[SEAL.] Notary Public,
New York County.

City and County of New York, ss.:

I, CORTLANDT S. VAN RENSSELAER, attorney of the American Surety Company of New York, have compared the foregoing resolution with the original thereof, as recorded in the minute book of said company, and do certify that the same is a correct and

148 true transcript therefrom, and of the whole of said original resolution.

Given under my hand, and the seal of the company at the City of New York, this 24th day of January, 1907.

CORTLANDT S. VAN RENSSELAER,
[L. S.] Attorney.

State, City and County of New York, ss.:

On this 24th day of January, 1907, before me personally appeared Lewis B. Reed, Vice-President of the American Surety Company of New York, to me known, who being by me duly sworn, did depose and say that he resided in the City of New
149 York; that he is the Vice-President of the American Surety Company of New York, the corporation described in and which executed the above instrument; that he knew the corporate seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order; and that the liabilities of said corporation do not exceed its assets as ascertained in the manner provided by law. And the said Lewis B. Reed further said that he was acquainted with Cortlandt S. Van Rensselaer and knew him to be one of the attorneys of said corporation; that the signature of said Cort-
150 landt S. Van Rensselaer subscribed to the said instrument, is in the genuine handwriting of the said Cortlandt S. Van Rensselaer and was thereto subscribed by the like order of the said Board of Directors, and in the presence of him the said Lewis B. Reed, Vice-President.

MARSHALL L. BROWER,
[L. S.] Notary Public,
New York County.
Certificate filed in all Counties.

E. 151

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JAMES POLLITZ,
Plaintiff,

vs.

THE WABASH RAILROAD COMPANY, Edward T. Jeffery, Frederic A. Delano, Edgar T. 152
Welles, John C. Otteson, Robert C. Clowry, Robert M. Gallaway, Thomas H. Hubbard, George J. Gould, Winslow S. Pierce, John T. Terry, Joseph J. Slocum, Mercantile Trust Company, United States Mortgage and Trust Company, Henry Evans, Henry K. Pomroy, George M. Cumming, The Bowling Green Trust Company, J. C. Van Blarcom, James B. Forgan and the Metropolitan 153
Trust Company of the City of New York,
Defendants.

Please to take notice that on the complaint and petition and bond for removal in this action, and on the affidavit of James Pollitz, a copy of which is hereto annexed, I shall move this Honorable Court, at a term thereof appointed to be held for the purpose of hearing motions, on the 15th day of Febru-

154 ary, 1907, at the opening of Court on that day, or as soon thereafter as counsel can be heard, for an order to remand the above entitled cause to the Supreme Court of the State of New York, in and for the County of New York, in the City of New York, from whence it came, upon the following grounds:

1. That the record in the said cause does not present a case removable from the State Court to this Court under the statute governing such cases.

2. That the record in the said cause does not present a separable controversy in contemplation of the act authorizing the removal of causes.

155 3. The requisite diverse citizenship required as a condition precedent to the jurisdiction of this Court in a controversy of the character presented by this record does not exist.

4. This Court would not have had, and has not now, any jurisdiction over the parties to this suit by reason of the absence of diverse citizenship, and of the fact that several of the defendants, who are necessary defendants to this action, are citizens of the same State with the plaintiff.

5. That the petition and bond to remove this cause, and each of them, are defective and insuf-
156 ficient to effect a removal of the whole case, in that they are each of them executed by one defendant only.

6. That the petition is defective and insufficient in that it misstates the nature and character of this cause, and in that it states that the sole primary character of this action, as disclosed by the said complaint, is to decree and adjudge to be *ultra vires*, illegal and void the scheme for the issue of certain securities, to decree to be illegal, void and of no effect all of the bonds and preferred and common stock issued, used or applied by the defendant

Wabash Railroad Company, for the purposes which 157
are set forth in the complaint in this action, and pending this action, to restrain and enjoin the said defendant, its officers, agents, servants and attorneys from taking any further proceedings to carry into effect the plan referred to in the complaint, and from paying any interest upon any of its new bonds which have been issued thereunder, and from transferring upon its books any certificates representing any of its preferred and common stock issued under said plan, and from paying any dividends upon any part of its preferred stock issued under said plan, and from permitting to be received and counted any votes with reference to the shares of preferred and common stock so issued; whereas, in fact, 158
the primary and fundamental purpose of this cause is also stated in the said complaint to be to decree and order the defendants United States Mortgage and Trust Company, Bowling Green Trust Company, J. C. Van Blarcom and James B. Forgan, and each of them, to re-exchange and re-deliver any and all of the debenture mortgage bonds of the Wabash Railroad Company, Series A and B, held by them, or any of them, which have been by the owners thereof exchanged for new mortgage bonds, preferred and common stock of said Wabash Railroad Company under the plan and scheme which is described in the complaint, to holders of the new four per cent. mortgage bonds, preferred and com- 159
mon stock, in the same proportions as they were issued in exchange for debenture mortgage bonds under said plan and scheme, to the end that the depositing bondholders, or their assigns, the holders of said new bonds and preferred and common stock, may be restored to their original position as holders of the debenture mortgage bonds; and also to decree and order the defendants Edward T. Jeffery, Frederic A. Delano, Edgar T. Welles, Robert C. Clowry, Robert M. Gallaway, George J. Gould, Winslow S. Pierce, Thomas H. Hubbard, John T. Terry and Joseph Slocum, and each of them, and

160 the defendant United States Mortgage and Trust Company, to restore and return to the defendant Wabash Railroad Company all of the said fifty-year four per cent. bonds, and all of the preferred and common stock of the defendant Wabash Railroad Company which have been, or may hereafter be issued and used in exchange for such debenture bonds; and also in the event that, for any reason, said last named defendants shall be unable to do so, that they and each of them be ordered and decreed to pay into the treasury of the Wabash Railroad Company the aggregate par value of such bonds and common and preferred stock so issued; and also to order and decree the Mercantile Trust Company
161 to return and deliver to said Wabash Railroad Company all of the shares of common and preferred stock so issued, which have been or may be countersigned by said Mercantile Trust Company and used in exchange for such debenture bonds, and in default of such Trust Company being, for any reason, unable to do so, that it be ordered and decreed to pay into the treasury of The Wabash Railroad Company the par value of such common and preferred stock so countersigned and used; and in default of the relief which is above referred to, that the said defendants and each of them be ordered to account for and pay into the treasury of The Wabash Railroad Company, so much of the par
162 value of the said bonds and stocks so issued and exchanged for the said debenture bonds as may be found to exceed the actual market value of the said debenture bonds at the time such exchange was made; and also to decree and order the return by the defendant Metropolitan Trust Company of the City of New York to the Wabash Railroad Company of all of the bonds and common and preferred stock of said Wabash Railroad Company so received by it in exchange for $5,435,000 of said debenture bonds; and in default of being able for any reason so to return the said bonds and stocks, that said Metropolitan Trust Company of the City of New

York be adjudged and decreed to pay into the treasury of said Wabash Railroad Company so much of the par value of said bonds and preferred and common stock so received by it in exchange for said debenture bonds as may be found to exceed the market value of such debenture bonds at the time the exchange was made; and that the plaintiff cannot have adequate relief in the premises, or any relief whatsoever in this action, as against the said United States Mortgage and Trust Company, the Mercantile Trust Company, the Bowling Green Trust Company, the Metropolitan Trust Company, or against the individual defendants herein, or any of them, without joining all of said defendants in this action. 163 164

7. That the defendants, the United States Mortgage and Trust Company, the Mercantile Trust Company, the Bowling Green Trust Company, and the Metropolitan Trust Company of the City of New York, are all corporations organized by, and existing under the laws of the State of New York, and are citizens of the State of New York, and the plaintiff and many of the individual defendants who are named in the complaint in this cause, either as officers and directors of the said Wabash Railroad Company, or otherwise, are citizens of the said State of New York, and residents of the Southern District of New York, and that this Court cannot acquire jurisdiction over any of the said defendants who are such citizens and residents for the purpose of rendering any judgment herein. 165

8. That the bond given upon the removal of this cause is insufficient, in that it is executed only by the defendant, The Wabash Railroad Company.

9. And for other reasons which are apparent upon the face of the record, and to be assigned upon the argument of this motion.

166 10. And for such other and further relief as may be proper.

Dated New York, February 6, 1907.

Yours, &c.,

STEPHEN M. YEAMAN,
Solicitor for Plaintiff.
Office and P. O. address,
15 William Street,
New York City.

To Messrs. PIERCE & GREER,
Solicitors for Defendant The Wabash Railroad Company,
167 120 Broadway, New York.

Messrs. ALEXANDER & GREEN,
Solicitors for Deft. Mercantile Trust Company,
120 Broadway, New York City.

Messrs. DAVIES, STONE & AUERBACH,
Solicitors for Deft. United States Mtge. & Trust Company,
32 Nassau Street, New York City.

Messrs. PARSONS, CLOSSON & MCILVAINE,
Solicitors for Deft. Metropolitan Trust Co.,
52 William Street, New York.

DAVID RUMSEY, Esq.,
168 Solicitor for Deft. Evans, Pomroy & Cumming,
26 Liberty Street, N. Y.

Messrs. THOMPSON, VANDERPOEL & FREEDMAN,
Solicitors for Deft. Bowling Green Trust Co.,
2 Wall Street, New York.

F. 169

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JAMES POLLITZ,
Plaintiff,

vs.

THE WABASH RAILROAD COMPANY, Edward T. Jeffery, Frederic A. Delano, Edgar T. Welles, John C. Otteson, Robert C. Clowry, Robert M. Gallaway, Thomas H. Hubbard, Winslow S. Pierce, George J. Gould, John T. Terry, Joseph J. Slocum, Mercantile Trust Company, Henry Evans, Henry K. Pomroy, George M. Cumming, The Bowling Green Trust Company, J. C. Van Blarcom, James B. Forgan and the Metropolitan Trust Company of the City of New York, 170 171

Defendants.

UNITED STATES OF AMERICA,
Southern District of New York, } ss.:

JAMES POLLITZ, being duly sworn, says that he is the plaintiff in the above entitled cause. That this cause was originally brought in the Supreme Court of the State of New York, in the County of New

172 York, and was removed to this Court on the sole motion and application of the defendant The Wabash Railroad Company, on the 25th day of January, 1907.

The defendant Wabash Railroad Company is a corporation incorporated under the laws of the State of Ohio, and of several other States, and has an office for the transaction of business in the City of New York. That the defendants United States Mortgage and Trust Company, Mercantile Trust Company, Bowling Green Trust Company and the Metropolitan Trust Company of the City of New York, are corporations created by, and existing under the laws of the State of New York, and that each of said de-
173 fendants is located and doing business in the City of New York, and is a citizen of the State of New York.

Upon information and belief, that the defendants Edgar T. Welles, Robert C. Clowry, Robert M. Gallaway, Thomas H. Hubbard, Winslow S. Pierce, Henry Evans, Henry K. Pomroy and George M. Cumming, and each of them is a citizen of the State of New York, residing in the Southern District of New York.

That the ground of my information, and the source of my belief as to the residence of each of said defendants, is the fact that each of said defendants is stated in Trow's Directory of the City of
174 New York to be a resident of the Borough of Manhattan, in the City of New York.

That the complaint and exhibits thereto annexed show that the act of registering and exchanging the securities referred to in the complaint herein, and sought to be prevented, are to be done and performed in the City of New York by direction of the officers of the defendant, the Wabash Railroad Company, residing in the City of New York; and the said Mercantile Trust Company is the agent selected by said Wabash Railroad Company for the registration of its new issue of stock; and the de-

fendant United States Mortgage and Trust Company 175
is the agent selected by said Wabash Railroad Company and the committee of the debenture bondholders for accomplishing the delivery and exchange of the securities named in the complaint, and the Bowling Green Trust Company is, together with the defendants J. C. Van Blarcom and James B. Forgan, one of the trustees named and appointed in the trust deed by way of mortgage, which has been made to them as such trustees by the defendant The Wabash Railroad Company, upon all its franchises and property for the security of the payment of the principal and interest of the $200,000,000 of four per cent. bonds which are referred to in the complaint herein; and the defendant the Metropolitan 176
Trust Company of the City of New York was, at the time of the publication of the plan and scheme which is set forth in Exhibit B which is annexed to the complaint herein, the owner and holder of $5,435,000 of the debenture mortgage bonds Series B, which are referred to in the complaint, which said bonds have been deposited with the United States Mortgage and Trust Company under the plan and scheme in the complaint referred to, and the defendant Metropolitan Trust Company of the City of New York has received, or will receive, new bonds and preferred and common stock, or interim certificates therefor, under the said plan and scheme.

JAMES POLLITZ.

Sworn to before me this 6th) 177
day of February, 1907.)

CHAS. H. TOPPING,
[SEAL.] Notary Public,
New York County.

178 **G.**

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JAMES POLLITZ

vs.

THE WABASH RAILROAD COMPANY and others.

179

Motion to Remand to the State Court.

LACOMBE, *Circuit Judge:*

Plaintiff is a stockholder of the Wabash Railroad Company. Among the obligations of that company are two Series (A and B) of debenture bonds due in 1939. A plan has recently been proposed for retiring these bonds, by issuing and exchanging for them a certain amount of new four per cent. mortgage bonds and new preferred and new common stock. A stockholders' meeting was called in October last to consider the plan and a majority of
180 those present voted in favor of it, and for the issuance of the new bonds and stock necessary to carry out its provisions. At the same time ninety per cent. of the debenture holders voted in favor of the exchange. The complaint alleges that the plan has been carried out as to more than nine-tenths of the debenture bonds and new bonds and stock to the requisite amount have been issued.

The complaint sets forth the provisions of various State constitutions and statutes and avers that the "whole plan was and is illegal, unauthorized by law, in violation of law and *ultra vires*," and that

the bonds and stock issued pursuant thereto are unlawful and invalid. The complaint prays that the plan "be decreed and adjudged to be *ultra vires*," and that "all said bonds and preferred and common stock issued and used or applied by said Wabash Railroad Company for the purposes stated in said plan and scheme be decreed and adjudged illegal, void and of no effect." 181

The Wabash Railroad Company is a non-resident and removed the cause on the ground that there is a separable controversy between it and the plaintiff to which the other defendants (mostly residents of this State) are not necessary parties. These additional parties are (1) the individual directors, (2) the Trust Company which is the registrar of stock of the railroad company, (3) the committee which represents the debenture holders in carrying out the plan, (4) the Trust Company in which debentures are to be deposited pending exchange, (5) the trustees named in the mortgage to secure the new four per cent. bonds, and (6) a single individual holder of debenture bonds. 182

It is manifest that complainant can obtain complete relief without the presence of these additional parties. When he shall, by action against the Wabash Company, have established the proposition that the new bonds and stock are void, he need not concern himself with the re-exchange of such as may have been delivered; they will not constitute valid obligations against the railroad, and therefore will not affect the value of his stock. Individual holders of such of the new securities as have been issued may be allowed to intervene at the discretion of the Court, but their presence is not essential to the determination of the fundamental issues raised by the complaint. It is difficult to escape the conviction that these additional "parties" have been brought into the case with the sole purpose of preventing, if possible, the removal of the cause. 183

The motion to remand is denied.

184 **H.**

At a Stated Term of the Circuit Court of the United States in and for the Southern District of New York, held at the United States Court House and Post Office Building, in the Borough of Manhattan, City of New York, on the 21st day of February, 1907.

Present—Hon. E. HENRY LACOMBE,
Circuit Judge.

JAMES POLLITZ,
Plaintiff,

185

vs.

THE WABASH RAILROAD COMPANY, Edward T. Jeffery, Frederic A. Delano, Edgar T. Welles, John C. Otteson, Robert C. Clowry, Robert M. Gallaway, Thomas H. Hubbard, George J. Gould, Winslow S. Pierce, John T. Terry, Joseph J. Slocum, Mercantile Trust Company, United States Mortgage and Trust
186 Company, Henry Evans, Henry K. Pomroy, George M. Cumming, The Bowling Green Trust Company, J. C. Van Blarcom, James B. Forgan and The Metropolitan Trust Company of the City of New York,
Defendants.

This suit having been commenced in the New York Supreme Court in and for the County of New

York, and having been removed to this Court upon 187
the petition of the above named defendant The Wabash Railroad Company, and the plaintiff herein having moved to remand this suit to the New York Supreme Court in and for the County of New York from which it came, and said motion having come on regularly to be heard, and Stephen M. Yeaman, Esq., of counsel for the plaintiff, having appeared in support of said motion, and Rush Taggart, Esq., of counsel for the above named defendant The Wabash Railroad Company, having appeared in opposition to said motion, and the same having been fully considered and the opinion of this Court having been delivered, it is now, in accordance with said opinion, 188

Ordered, that said motion be and the same is hereby denied.

Enter.

E. HENRY LACOMBE,
Circuit Judge.

FILE COPY.

No. 16 Original.

Supreme Court of the United States.

OCTOBER TERM, 1906.

Office Supreme Court, U. S.
FILED.
MAR 27 1907
JAMES H. McKENNEY,
CLERK

[ORIGINAL]

IN THE MATTER

of

THE APPLICATION OF JAMES POLLITZ FOR A WRIT OF MANDAMUS AGAINST THE HONORABLE E. HENRY LACOMBE, CIRCUIT JUDGE OF THE UNITED STATES FOR THE SECOND CIRCUIT AND FOR THE SOUTHERN DISTRICT OF NEW YORK, AND AGAINST THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Brief in Support of Motion for Leave to File Petition and for Rule.

ROGER FOSTER,
Attorney for JAMES POLLITZ,
35 Wall Street,
New York.

In the Supreme Court of the United States,

OCTOBER TERM, 1906.

(ORIGINAL.)

IN THE MATTER

OF

The Application of JAMES POLLITZ for a Writ of Mandamus against the Honorable E. Henry Lacombe, Circuit Judge of the United States for the Second Circuit, and against the Circuit Court of the United States for the Southern District of New York.

BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE PETITION AND FOR RULE.

Statement.

This is an application for leave to file a petition for the writ of peremptory mandamus and for an order to show cause why such a writ should not be issued commanding Honorable E. Henry Lacombe, Circuit Judge of the United States for the Second Circuit, and commanding the Circuit Court of the United States for the Southern District of New York: to re-

mand a cause which has been removed to said Court from the Supreme Court of the State of New York because of an alleged separable controversy charged to exist between the plaintiff, a citizen of New York, and the Wabash Railroad Company, a corporation consolidated and created under the laws of Missouri, Ohio, Indiana, Michigan and Illinois. Nearly all the other defendants are citizens of the State of New York. The action was brought in the Supreme Court of the State of New York by a stockholder of the defendant railroad company. The complaint seeks to set aside and enjoin the continuance of the performance of an unlawful agreement prejudicial to the stockholders, providing for the exchange by the holders of debenture income bonds, the interest payable upon which is not cumulative, for an allotment of new stock, common and preferred, and of new mortgage bonds, of the defendant railroad company. It alleges in substance as follows: An agreement, against complainant's protest, for such exchange of securities has been made between the corporation, through a board of directors, those in control of which are themselves debenture bondholders, and by a committee which represents all the debenture bondholders. This was ratified by nine-tenths of such bondholders (pp. 13–16). A large number of these bonds have already been exchanged for *ad interim* certificates and receipts (p. 18). The new bonds and stock certificates have been executed and given to the defendant the U. S. Mortgage and Trust Company, to make the exchange (p. 25). Some of the new bonds have already been exchanged (p. 27). Interest, not due or payable by the terms of the debenture bonds, has been paid upon the new bonds issued in exchange; and unless an injunction is granted, such interest will continue to be paid upon the new bonds to those allotted them under the unlawful contract (p. 26). The principal relief prayed is a re-exchange and cancellation of the new securities (p. 29). In the alternative, there

is a prayer that the directors, the depositary of the new bonds, the registrar of the new stock, and certain bondholders, pay to the railroad company the value of such of the new securities as cannot be restored (p. 30). As subsidiary relief, complainant prays for an injunction against the continuance of the exchange, against the payment of interest upon the new bonds, and against the transfer of the new stock upon the books of the railroad company, and for an accounting by the directors for the sums already paid for unlawful interest (pp. 31, 32).

The defendants are the Wabash Railroad Company, a consolidated corporation under the laws of Illinois, Ohio, Indiana, Michigan and Missouri (p. 9); a committee of the debenture bondholders (p. 11); several individual holders of the same, including the Metropolitan Trust Company, of New York (pp. 26, 27), and several of the directors of the Wabash Railroad Company (p. 26); the depositary of the new and old securities, the United States Mortgage and Trust Company, of New York, which has the duty of making the exchange (p. 18); the three trustees under the new mortgage, among them the Bowling Green Trust Company, a New York corporation (p. 10), and the Mercantile Trust Company, also of New York, which is the registrar of the new stock certificates (p. 18). All of these, except the Wabash, a few of the directors, Messrs. Gould of New Jersey, Delano and Jeffery of Illinois, and Van Blarcom of Missouri, and Forgan, of Illinois, the trustees under the new mortgage, are citizens of New York. And so is the plaintiff (p. 23).

POINT I.

The Circuit Court of the United States had no original jurisdiction of the case; since the presence of all the defendants was indispensable to an adjudication concerning any part of the relief prayed against the Wabash Railroad Company.

There can be no right to the removal of the case of a controversy, of which that Court could not have taken original jurisdiction.

Ex parte Wisner, 203 U. S., 51.

POINT II.

There can be no separable controversy where all the parties are indispensable to the determination of the matters in dispute between the plaintiff and the defendant, who seeks a removal.

There can be no removal, when an indispensable party to the controversy is a citizen of the same State as any party on the side opposite to him. When the removal is because there are two controversies, the case must be separable into parts, so that in one of them a controversy will be presented wholly between citizens of different States, which can be fully determined without the presence of the other parties.

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Where there are separate remedies against the several parties upon the same cause of action, there is no separable controversy. *Gudger* v. *Western N. C. R. Co.*, 21 Fed. R., 81; *Winchester* v. *Loud*, 108 U. S., 130; *Merchants' Cotton Press & Storage Co.* v. *Insurance Co. of N. A.*, 151 U. S., 368; *Ayers* v. *Wiswall*, 112 U. S., 187.

Where defendants are interested in separate parts of the same subject matter, no separable controversy is presented.

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The trustees of the new mortgage, the issue of bonds under which is attacked, and probably some other representatives of the bondholders, by whom the complaint prays that a re-exchange may be compelled of whatever has been exchanged, and that a further exchange may be enjoined; the depositary of the new securities; the registrar of the new stock, and the directors charged with fraud, are all indispensable parties to the relief here sought.

This is not a suit to prevent the execution of an unlawful contract. It is one to prevent the further performance of a contract already executed and partially performed. The parties who, if the contract is valid, have a right to the new securities, *which some of them have received* (p. 27), have, undoubtedly a right to be heard in any suit to declare those securities void, and to set them aside. No adjudication of such a character can properly be made unless they are present or represented. Their right to a hearing cannot be left to the discretion of the Court below, should they pray leave to intervene. The plaintiff, in order to avoid a multiplicity of suits, also has the right to compel them to set up in this case any defenses that they may have. He has the further right to join those agents of the scheme and fellow conspirators, such as the depositary for exchange, and the registrar, who will not be bound by an injunction against the railroad company, and who may consummate the unlawful scheme while he is litigating with the latter.

In *Brown* v. *Trousdale*, 138 U. S., 389, a suit was brought in the State Court to declare invalid a whole issue of county bonds. A large number of the bondholders resided in the State, two of whom were made defendants. The plaintiff alleged ignorance as to who the other bondholders were, and asked that notice be given to them to come in and defend. Two bondholders, non-residents of the State, were allowed to intervene as parties defendant and to defend. Two of the resident bondholders who were made original parties declined to resist the plaintiff's claim, and answered that they had no defense. The two non-resident bondholders removed the cause to the Circuit Court upon the ground of a separable controversy between them and the county; but although there was diverse citizenship, this Supreme Court held that there was no separable controversy, and that the decree below should be reversed, and the cause remanded to the State Court.

The Bowling Green Trust Company, Van Blarcom and Forgan, who are trustees under the new mortgage, the bonds of which are to be exchanged for the debenture bonds, and the committee of the debenture bondholders, are indispensable parties to any suit to set aside the contract for the exchange, and to enjoin its continued performance.

It is well settled that every party to a contract is a necessary party in a suit to set it aside, or unless its performance would amount to a nuisance to enjoin a person from bringing it into effect.

Northern Ind. R. Co. v. *Michigan C. R. Co.*, 15 How., 233; *Shields* v. *Barrow*, 17 How., 130; *Coiron* v. *Millaudon*, 19 How., 113; *Gaylords* v. *Kelshaw*, 1 Wall., 81; *Ribon* v. *Railroad Cos.*, 16 Wall., 446; *Lawrence* v. *Wirtz*, 1 Wash. C. C., 417; *Tobin* v. *Walkinshaw*, 1 McAll., 26; *Bell* v. *Donohoe*, 17 Fed. R., 710; *Florence S. Mach. Co.* v. *Singer Mfg. Co.*, 4 Fisher's Pat. Cas., 329; s. c. 8 Blatchf. C. C., 113; *Chadbourne* v. *Coe*, 45 Fed. R., 822; *Empire C. & T. Co.* v. *Empire C. & M. Co.*, 150 U. S., 159; *New Orleans W. Co.* v. *New Orleans*, 164 U. S., 471; s. c.

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a. Since both the debenture bondholders and the holders of the new bonds are numerous, it is absolutely indispensable that some one should be made a party to protect their interests. The trustee of the mortgage is, consequently, an indispensable party. *Ribon* v. *Railroad Cos.*, 16 Wall, 446; *Wenger* v. *Chicago & E. R. Co.*, C. C. A., 114 Fed. R., 34.

The bondholders committee is also an indispensabe party, being a party to the original contract which provided for this illegal exchange of securities. *Farmers' Loan & Trust Co.* v. *Cape Fear & Y. V. Ry. Co.*, 71 Fed. R., 38; Minnesota v. N. Sec. Co. 194 U.S. 199.

The trustee of an active trust is always an indispensable party. *Knapp* v. *Railroad Co.*, 20 Wall., 117; *Rust* v. *Britol Silver Co.*, C. C. A., 58 Fed. R., 611; *Tell* v. *Walker*, Fed. Cas. No. 13,812; *Thair* v. *Life Association of America*, 112 U. S., 717; *Pepper* v. *Fordysche*, 119 U. S., 469.

b. The registrar of the stock, the Mercantile Trust Company, and the United States Mortgage and Trust Company, which is the depositary of the new bonds, are also indispensable parties.

It is well settled that a stake holder in the possession of property is an indispensable party to a suit affecting the same. *Wilson* v. *Oswego Tp.*, 151 U. S., 56; *Massachusetts & S. Constr. Co.* v. *Cane Creek Tp.*, 155 U. S., 283; *Scoutt* v. *Keck*, C. C. A., 73 Fed., 900.

c. It has been held that there is no separable controversy, when different defendants are charged, as here, with having joined in a conspiracy to cloud the complainants' title and to defraud them of their property. *Little* v. *Giles*, 118 U. S., 596.

Nor, when an injunction is sought, as here, to enjoin the defendants from the pertormance of acts directly

connected with each other. *Yerrian* v. *Horner*, 36 Fed. R., 130; *Anderson* v. *Bowers*, 40 Fed. R., 708; *Davis* v. *County Court of Randolph County*, 88 Fed. R., 705; *Vulcan Detinning Co.* v. *American Can Co.*, 130 Fed. R., 635.

Where a bill was filed to enjoin certain individual defendants from selling, and a defendant corporation from permitting the transfer on its books of certain stock of the corporation; it was *held*, that there was no separable controversy. *Yerrian* v. *Horner*, 36 Fed. R., 130.

d. The directors of the Wabash Railroad Company who are debenture bondholders, are also indispensable parties.

Whenever actual participation in a fraud is charged against a director, or a personal liability is sought to be imposed upon him, he is an indispensable party to the suit. *Fox* v. Mackay, 60 Fed. R., 4; *Seddon* v. *Virginia, T. & C. S. & I. Co.*, 36 Fed. R., 6; 1 L. R. A., 108.

POINT IV.

Mandamus is the proper remedy.

It would be a needless waste of the time of the Court below to reserve a decision upon this vital point of jurisdiction until after a final hearing on the merits.

Ex parte Wisner, 203 U. S., 51.

POINT V.

It is respectfully submitted: that leave should be granted to file the petition; and that a rule should be entered, directing the Honorable E. Henry Lacombe, United States Circuit Judge for the Second Circuit, and the Circuit Court of the United States for the Southern District of New York, to show cause why there should not issue a writ of mandamus compelling them, and each of them, to remand to the Supreme Court of the State of New York for the County of New York the suit brought by James Pollitz, as plaintiff, against The Wabash Railroad Company, Edward T. Jeffery, Frederic A. Delano, Edgar T. Welles, John C. Otteson, Robert C. Clowry, Robert M. Gallaway, Thomas H. Hubbard, George J. Gould, Winslow S. Pierce, John T. Terry, Joseph J. Slocum, Mercantile Trust Company, United States Mortgage and Trust Company, Henry Evans, Henry K. Pomroy, George M. Cumming, The Bowling Green Trust Company, J. C. Van Blarcom, James B. Forgan and The Metropolitan Trust Company of the City of New York, as defendants.

ROGER FOSTER,
of Counsel for Petitioner.

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FILED.
APR 6 1907
JAMES H. McKENNEY,

Supreme Court of the United States.

OCTOBER TERM, 1906.

[ORIGINAL—No. 16]

IN THE MATTER

of

THE APPLICATION OF JAMES POLLITZ FOR A WRIT OF MANDAMUS AGAINST THE HONORABLE E. HENRY LACOMBE, CIRCUIT JUDGE OF THE UNITED STATES FOR THE SECOND CIRCUIT AND FOR THE SOUTHERN DISTRICT OF NEW YORK, AND AGAINST THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Brief in Support of Motion for Petition for Peremptory Writ of Mandamus.

ROGER FOSTER,
Counsel for JAMES POLLITZ, *Petitioner*,
35 Wall Street,
New York.

In the Supreme Court of the United States,

OCTOBER TERM, 1906.

(ORIGINAL No. 16.)

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The Application of JAMES POLLITZ for a Writ of Mandamus against the Honorable E. Henry Lacombe, Circuit Judge of the United States for the Second Circuit, and against the Circuit Court of the United States for the Southern District of New York.

BRIEF IN SUPPORT OF PETITION FOR PEREMPTORY WRIT OF MANDAMUS.

Statement.

This is a hearing upon the return of a rule, which has been duly served, directing Judge Lacombe, of the Second Circuit, to show cause why a writ of peremptory mandamus should not be issued, commanding him to remand a cause which has been removed to the Circuit Court of the United States for the Southern District of New York, because of an alleged sep-

arable controversy charged to exist between the plaintiff, a citizen of New York, and the Wabash Railroad Company, a corporation consolidated and created under the laws of Missouri, Ohio, Indiana, Michigan and Illinois. Nearly all the other defendants are citizens of the State of New York. The action was brought in the Supreme Court of the State of New York by a stockholder of the defendant railroad company. The complaint seeks to set aside and enjoin the continuance of the performance of an unlawful agreement prejudicial to the stockholders, providing for the exchange by the holders of debenture income bonds, the interest payable upon which is not cumulative, for an allotment of new stock, common and preferred, and of new mortgage bonds, of the defendant railroad company. It alleges in substance as follows: An agreement, against complainant's protest, for such exchange of securities has been made between the corporation, through a board of directors, those in control of which are themselves debenture bondholders, and by a committee which represents all the debenture bondholders. This was ratified by nine-tenths of such bondholders (pp. 13-16). A large number of these bonds have already been exchanged for *ad interim* certificates and receipts (p. 18). The new bonds and stock certificates have been executed and given to the defendant, the U. S. Mortgage and Trust Company, to make the exchange (p. 25). Some of the new bonds have already been exchanged (p. 27). Interest, not due or payable by the terms of the debenture bonds, has been paid upon the new bonds issued in exchange; and unless an injunction is granted, such interest will continue to be paid upon the new bonds to those allotted them under the unlawful contract (p. 26). The principal relief prayed is a re-exchange and cancellation of the new securities (p. 29). In the alternative, there

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POINT I.

The Circuit Court of the United States had no original jurisdiction of the case; since the presence of all the defendants was indispensable to an adjudication concerning any part of the relief prayed against the Wabash Railroad Company.

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a. Since both the debenture bondholders and the holders of the new bonds are numerous, it is absolutely indispensable that some one should be made a party to protect their interests. The trustee of the mortgage is, consequently, an indispensable party. *Ribon* v. *Railroad Cos.*, 16 Wall, 446; *Wenger* v. *Chicago & E. R. Co.*, C. C. A., 114 Fed. R., 34.

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(*e*) *The following cases were not printed in our former brief:*

In *Minnesota* v. *Northern Securities Co.,* 184 U. S., 199, 245, 246; the object of the bill was to prevent the Northern Securities Co. from making any use of the stock, or from voting any of the capital stock, and from exercising any control over two railroad companies, who were not parties to the suit. It was held, that those railroad companies, were indispensable parties to the controversy.

This Court said, speaking through Mr. Justice Shiras:

"Can such a controversy be determined with due "regard to the interests of all concerned, by a suit "solely between the State of Minnesota and the "Northern Securities Company? It is, indeed, "alleged that all of the stockholders of the North-

"ern Securities Company are stockholders in the "two railroad companies, and, therefore, it may "be said that the latter stockholders are sufficiently "represented in the litigation by the Northern Se- "curities Company; but it is not alleged that the "stockholders of the Northern Securities Company "constitute or are composed of all the stockhold- "ers of the two railroad companies, and, in fact, "the contrary is conceded in the allegations of the "bill that a majority only of the stock of one, or "perhaps both of the two railroad companies is "owned, or at least controlled and managed, by the "Northern Securities Company. It is obvious, there- "fore, that the rights of the minority stockholders "of the two railroad companies are not represented "by the Northern Securities Company. They have "a right to be represented, in the controversy, by "the companies whose stock they hold, and their "rights ought not to be affected without a hearing, "even if it were conceded that a majority of the "stock in such companies, held by a few persons, "had assisted in forming some sort of an illegal "arrangement. Moreover, it must not be over- "looked that it is not the private interests of stock- "holders that are to be alone considered. The di- "rectors of the Great Northern and Northern Paci- "fic Railway Companies are appointed to repre- "sent and protect not merely the private and pe- "cuniary interests of the stockholders, but the "rights of the public at large, which is deeply con- "cerned in the proper and advantageous manage- "ment of these public highways. It is not sufficient "to say that the Attorney General, or the Governor, "or even the Legislature of the State, can be con- "clusively deemed to represent the public interests "in such a controversy as that presented by the bill. "Even a State, when it voluntarily becomes a com- "plainant in a court of equity, cannot claim to rep- "resent both sides of the controversy. Not only "have the stockholders, be they few or many, a "right to be heard, through the officers and di- "rectors whom they have legally selected to rep- "resent them, but the general interests of the pub- "lic, which might be deeply affected by the decree "of the court, are entitled to be heard; and that, "when the State is the complainant, and in a case

"like the present, can only be affected by the pres-
"ence of the railroad companies as parties de-
"fendant.

"Upon investigation it might turn out that the
"allegations of the bill are well founded, and that
"the State is entitled to relief, or it might turn
"out that there is no intention or design on the
"part of the railroad companies to form any com-
"bination in disregard of the policy of the State,
"but that what is proposed is consistent with that
"policy and advantageous to the communities af-
"fected. But, in making such investigation, a
"court of equity must insist that both sides of the
"controversy shall be adequately represented and
"fully heard."

In *Wilder* v. *Virginia, T. & C., Steel & Iron Co.*, 46 Fed. R., 676, 677, decided by Mr. Chief Justice Fuller, *the headnote* reads as follows:

"Some of the stockholders and creditors of a New
"Jersey corporation, part of whom were citizens
"of Virginia, brought an action in a Virginia State
"court against the corporation and its promoters,
"who owned the majority of its stock, alleging that
"the latter had defrauded the corporation in the
"payment of their subscriptions, and that they had
"wasted the funds of the New Jersey corporation
"in acquiring the stock of various Virginia corpora-
"tions contrary to complainants' rights. The Vir-
"ginia corporations were also joined as defendants,
"and the theory of the bill was that complainants
"had the right to have the entire assets of the New
"Jersey corporation brought into court, and, to
"that end, that the various Virginia corporations,
"which had secured its funds, should also be wound
"up. *Held*, that incidental averments of indebt-
"edness of the New Jersey corporations to the credi-
"tors who had joined as complainants in the bill
"did not constitute a separate controversy between
"them and the New Jersey corporation, so as to en-
"title the latter to remove the cause into a federal
"court on the ground that such complainants were
"citizens of a State different from that of the cor-
"poration."

"Allegations in the bill that one of the Virginia "corporations was organized by the promoters of "the New Jersey corporation, with intent to de- "fraud the stockholders of the latter, and that the "New Jersey corporation had fraudulently con- "veyed land to the Virginia corporation without any "valuable consideration, and at a great loss, do not "constitute a separate controversy between com- "plainants and the New Jersey corporation, so as "to entitle the latter to remove the cause into a "federal court, since the Virginia corporation and "the promoters of the New Jersey corporation, "some of whom are citizens of the same State with "complainants, are indispensible parties defend- "ant."

Cape Girardeau & S. L. R. R. v. *Winston*, 4 Cent. Law J., 127, Fed. Cas. No. 2,390, decided by Dillon and Treat, *JJ.:*

"In a suit brought in the State court by the plain- "tiff corporation to set aside a deed of trust, made "by its officers and another corporation of the same "State, a removal of the cause to the United States "court was sought by the surviving trustee in the "deed of trust and one of the bondholders under "it. *Held* that, the latter corporation being a nec- "essary party, and no final or effectual determina- "tion of the case made by the bill being possible "without its presence, the petitioners could not "have the cause removed under the act of 1866 "(Rev. St. Sec. 693, cl. 2), as to them."

In *Anderson* v. *Bowers*, 40 Fed. R., 708, 709, an action was brought against the county officers and bondholders, to cancel the bonds and to enjoin the cancellation of a tax levied for their payment. It was *held*, that the controversy between the plaintiffs and the bondholders was not separable from that between him and the county officers.

Shiras, *J.:*

"Viewed with relation to the county of- "ficials and the bondsholders, I do not think a sep- "arable controversy exists. As against the "county officials, the remedy sought is a de-

"cree declaring the tax void. and restraining its "collection, but the ground alleged therefor is the "illegality of the bonds. As against the bondhold- "ers, the remedy sought is a decree declaring the "bonds void, and restraining their collection, on "the same ground of illegality in the issu- "ance thereof. The decision of the one question "of the validity of the bonds held by the Orient "Insurance Company decides alike the question "whether the county officials should be restrained "from collecting the tax, and the question whether "the bonds shall be decreed to be void. It cannot, "therefore, be held that the bill presents a con- "troversy against the Orient Company, touching "the bonds owned by it, separable from the con- "troversy, touching the same bonds, presented by "the bill viewed in relation to the county officials."

To the same effect is *Anderson* v. *Orient Fire Ins. Co.*, 88 Iowa, 579; 55 N. W., 348.

Hanover Nat. Bank v. *Credits Commutation Co.*, 118 Fed. R., 110:

"A suit in equity by stockholders against the cor- "poration, its directors and another stockholder, "who owns a majority of the stock, to enjoin the "defendants from making certain dispositions and "uses of the property and assets of the corporation, "does not involve a separable controversy between "complainants and the defendant stockholder which "gives the latter the right to remove the cause into "a federal court on the ground of diversity of citi- "zenship, where complainants and the corporation "are citizens of the same State."

See also *Shumway* v. *Chicago & I. R. Co.*, 4 Fed R., 385.

In *Douglas* v. *Richmond & D. R. Co.*, 106 N. C., 65, 10 S. E., 1048;

Plaintiffs were citizens of North Carolina, and stockholders in the defendant the N. Railroad Company, a corporation of that state. Defendant the R. Railroad Company was a Virginia corporation. Plaintiffs alleged that the N. Company issued

to the R. Company a majority of its stock, and certain bonds as security for work to be performed by the R. Company; that the R. Company had not performed its agreement, and that its debt had been paid; that the R. Company elects the officers and controls all the actions of the N. Company. Plaintiffs sought to have defendants account for the N. Company's property, and to have the stock and bonds held by the R. Company surrendered. Both companies denied the rights and allegations of plaintiffs. *Held,* that the N. Company was a necessary party defendant, and that it was not a "controversy wholly between citizens of states," or one which could be fully determined between them, if it should be divided between the state and federal courts, within 24 Stat. 553, c. 373, § 2.

That a depositary is an indispensable party to a suit affecting the title to the deposit is held in *Bailey* v. *New York Savings Bank,* 18 Blatchf., 77, 2 Fed. R., 14; *Security Co.* v. *Pratt,* 64 Fed. R., 405.

To a stockholder's action to recover dividends received by the holders of stock in another company from that in which the plaintiff was interested, which these defendant corporations had fraudulently received from the plaintiff; it was held that there was no separable controversy between the complainant and the individual defendants. *Burke* v. *Flood,* 6 Sawyer, 220, 1 Fed. R., 541.

To a stockholder's suit to set aside a lease by his company to another, and to enjoin his directors from unlawful acts in connection with the same; it was held that the directors were indispensable parties to the controversy. *Mills* v. *Central R. Co.,* 20 Fed. R., 449, 451:

"In this case the suit is against the Central Rail-
"road Company and a number of individuals, some
"of whom are citizens of the same State with the
"complainants, and others are citizens of different

"States, and specific relief is prayed against the "acts of the corporation and of the individuals "who are made defendants. Even if the theory "should be adopted that the New Jersey Central "Railroad Company is the real complainant, some "of the defendants against whom relief is sought "are citizens of the same State, and they are indis- "pensable parties, if the complainants are to have "determined the questions raised in the pleadings, "and to have extended to them the full measure "of relief which they pray for."

To a similar effect are the decisions in *Oakes* v. *Yonah Land & Mining Co.*, 89 Fed. R., 243; *Hanover National Bank* v. *Credits Commutation Co.*, 118 Fed. R., 110; *MacGinniss* v. *Boston & Montana Consolidated Copper & Silver Mining Co.*, 55 C. C. A., 648, 119 Fed. R., 96.

A case precisely analogous to the one at bar is *Campbell* v. *Milliken*, 119 Fed. R., 981:

"Various charges are made of misconduct on the "part of the natural persons, defendants in the bill, "Milliken and Hill, that they have taken funds of "the corporation, and applied them to their own "use. The purpose of the bill is to have these de- "fendants account to the corporation for moneys "so taken. In addition to this, it is charged that "these natural persons have called a meeting of the "corporation to be held on Monday next, and the "purpose is at that meeting to cause the property "of the company to be conveyed to a new company "organized in the territory of Arizona. And for "the purpose of preventing the accomplishment of "any such purpose as that, and the further diver- "sion of funds of the corporation to their own use, "the bill asks that they may be enjoined from hold- "ing the meeting, and from conveying the property, "and also asks that a receiver may be appointed."

Held, that there was no controversy between the plaintiffs, who were stockholders, and their corporation, separable from that between him and the defendant officers, and that the corporation could not remove the case.

Had the Wabash been a New York corporation, and the defendants against whom an accounting is prayed been citizens of another State, and had they petitioned for a removal; a question might have arisen which is not in the present case.

POINT IV.

The remand was not denied because of the pendency of any other suit in the Federal Court; and had that been so, it would have been no justification for the removal.

(*a*) Neither the opinion of Judge Lacombe, nor his order, nor the petition for the removal, makes any reference to any previous suit in the Federal Court, as an alleged ground for the removal. The respondents are bound by the record below. They cannot ask this Court to take judicial notice of papers below that are not recited in the order.

Were it otherwise, the Courts would be liable to be misled by garbled statements of the contents of their records, not verified by affidavit, nor by the certification of the clerk.

Thornton v. *Carson,* 7 Cranch, 596; *Pennsylvania Co.* v. *Bender,* 148 U. S., 255; *Rout* v. *Ninde,* 118 Ind., 123, 20 N. E., 704; *Magee* v. *Hartzell,* 7 Kan. App., 489, 54 Pac. 129; *Dours* v. *Cazentre,* McGloin (La.), 251; *Stockbridge* v. *Fahnestock,* 87 Md. 127; 39 Atl., 95; *Scott* v. *Scott,* 17 Md., 78; *Cherry* v. *Baker,* 17 Md., 75; *Lyon* v. *Boilvin,* 7 Ill., 629.

Even the Court below could not have taken judicial notice of its records in another suit for the purpose of sustaining jurisdiction here.

In re Manderson (C. C. A), 51 Fed. R., 501.

(*b*) Were the record of the suit, to which the respondents referred, to be examined, it would be found to be entirely different from that which is the subject of the present review, and that the present case in no respect could be deemed ancillary to the same.

(*c*) Even, however, were the suit below ancillary to one previously brought, of which there is no suggestion in the pleading or the record, still that would constitute no ground for the removal.

In *Gilmore* v. *Herrick,* 93 Fed. R., 525; Judge Taft said:

"There is no language in any removal act which "justifies the removal of a cause from a State Court "to a Federal Court, on the ground that it is an- "cillary to a suit in a Federal Court."

To the same effect are *Ray* v. *Pierce,* 81 Fed., 881; *Pitkin* v. *Cowen,* 91 Fed. R., 599; *State Trust Co.* v. *Kansas City, P. & G. R. Co.,* 110 Fed., 10.

In *Peoples Bank* v. *Calhoun,* 102 U. S., 256; the defendants had consented to the removal of the suit, which was ancillary to one previously brought. This Court consequently *held* that, the suit having been brought by consent into the Federal Court, which might originally have taken jurisdiction of it as ancillary, it made no difference how it came there; whether by removal, or by original process, or by appearance *gratis;* and that the jurisdiction should be sustained. This is entirely different from an application for a removal, which is opposed by the plaintiff.

POINT V.

Mandamus is the proper remedy.

It would be a needless waste of time of the Court below to reserve a decision upon this vital point of jurisdiction until after a final hearing on the merits.

Ex parte Wisner, 203 U. S., 51.

POINT VI.

It is respectfully submitted: that the peremptory writ of mandamus should issue, directing the Honorable E. Henry Lacombe, United States Circuit Judge for the Second Circuit, and the Circuit Court of the United States for the Southern District of New York, and each of them, to remand to the Supreme Court of the State of New York for the County of New York the suit brought by James Pollitz, as plaintiff, against The Wabash Railroad Company, Edward T. Jeffery, Frederic A. Delano, Edgar T. Welles, John C. Otteson, Robert C. Clowry, Robert M. Gallaway, Thomas H. Hubbard, George J. Gould, Winslow S. Pierce, John T. Terry, Joseph J. Slocum, Mercantile Trust Company, United States Mortgage and Trust

Company, Henry Evans, Henry K. Pomroy, George M. Cumming, The Bowling Green Trust Company, J. C. Van Blarcom, James B. Forgan and The Metropolitan Trust Company of the City of New York, as defendants.

ROGER FOSTER,
Of Counsel for Petitioner.

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FILED.
APR 8 1907
JAMES H. McKENNE
CL

Supreme Court of the United States.

OCTOBER TERM, 1906.

No. 16.

(ORIGINAL.)

IN THE MATTER

OF

THE APPLICATION OF JAMES POLLITZ FOR A WRIT OF MANDAMUS AGAINST THE HONORABLE E. HENRY LACOMBE, CIRCUIT JUDGE OF THE UNITED STATES FOR THE SECOND CIRCUIT AND AGAINST THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Return of E. Henry Lacombe, Circuit Judge of the United States for the Second Circuit, and the Circuit Court of the United States for the Southern District of New York.

C. G. Burgoyne, Walker and Centre Street, N. Y.

In the Supreme Court of the United States.

IN THE MATTER

OF

The Application of JAMES POLLITZ for a Writ of Mandamus against the HONORABLE E. HENRY LACOMBE, Circuit Judge of the United States for the Second Circuit, and against the CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Return of E. Henry Lacombe, Circuit Judge of the United States for the Second Circuit, and the Circuit Court of the United States for the Southern District of New York.

TO THE HONORABLE MELVILLE W. FULLER, CHIEF JUSTICE OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES :

Answering the rule granted by this Honorable Court on March 25, 1907, directing E. HENRY LACOMBE, Circuit Judge of the United States for the Second Circuit, and the Circuit Court of the

United States for the Southern District of New York, to show cause on April 8, 1907, why the prayer of said petition for a writ of *mandamus* commanding the remand of a certain cause to the Supreme Court of the State of New York in and for the County of New York should not be granted, the respondent begs leave respectfully to state as follows:

1. That the repondent made and entered the order referred to in the petition of the petitioner denying the motion of the petitioner to remand said cause to the Supreme Court of the State of New York in and for the County of New York, in the exercise of the jurisdiction and judicial discretion conferred upon the respondent by law and for the reasons expressed in the opinion filed therewith; and

2. That the respondent submits to the judgment of this Honorable Court and respectfully refers to the brief of Rush Taggart, Esq., and Lawrence Greer, Esq., officers of this Court, which will be filed in this cause, and the authorities therein referred to, to show cause why the writ of *mandamus* should not issue.

New York, April 5, 1907.

E. HENRY LACOMBE,
Circuit Judge of the United States
for the Second Circuit.

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Supreme Court of the United States.

OCTOBER TERM, 1906.

Office Supreme Court, U.
FILED.
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JAMES H. McKENN

No. 16.

(ORIGINAL.)

IN THE MATTER

OF

THE APPLICATION OF JAMES POLLITZ FOR A WRIT OF MANDAMUS AGAINST THE HONORABLE E. HENRY LACOMBE, CIRCUIT JUDGE OF THE UNITED STATES FOR THE SECOND CIRCUIT AND FOR THE SOUTHERN DISTRICT OF NEW YORK, AND AGAINST THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF IN OPPOSITION TO APPLICATION FOR ISSUE OF WRIT OF MANDAMUS.

RUSH TAGGART,
LAWRENCE GREER,
Attorneys for Respondents.

C. G. Burroughs, Walker and Centre Street, N. Y.

Supreme Court of the United States,

OCTOBER TERM, 1906.

No. 16 (Original.)

IN THE MATTER

OF

The application of JAMES POLLITZ for a writ of mandamus against the Honorable E. HENRY LACOMBE, Circuit Judge of the United States for the Second Circuit and against the Circuit Court of the United States for the Southern District of New York.

BRIEF IN OPPOSITION TO THE APPLICATION FOR THE ISSUE OF A WRIT OF MANDAMUS.

Statement.

Upon the petition of James Pollitz filed in this Court for a writ of *mandamus*, and upon motion, a rule was entered on March 25, 1907, directing the Honorable E. HENRY LACOMBE, Circuit Judge of the United States for the Second Circuit in and for the Southern District of New York, and directing the Circuit Court of the United States for the Southern District of New York, to show cause on April 8, 1907,

why a writ of *mandamus* should not issue in accordance with the prayer of said petition. The purpose of the writ is to obtain the remand to the Supreme Court of the State of New York, in and for the County of New York, of a suit commenced therein by James Pollitz, a citizen and resident of the City, County and State of New York, against The Wabash Railroad Company and others, which action was removed from said Court into the Circuit Court of the United States for the Southern District of New York by the defendant The Wabash Railroad Company on the ground that a separable controversy existed between the plaintiff and the defendant The Wabash Railroad Company, a complete determination of which could be had without the presence of any of the defendants in the action other than the defendant The Wabash Railroad Company, and that all of said other defendants were neither indispensable nor necessary parties to the complete determination of said separable controversy, which was solely between the plaintiff and said defendant The Wabash Railroad Company, citizens of different States.

A motion was subsequently made by the plaintiff to remand said suit to the Supreme Court of the State of New York, in and for the County of New York, which motion, after having been heard and considered, was denied in accordance with the opinion given by the United States Circuit Court for the Southern District of New York, and an order denying said motion entered therein.

ARGUMENT.

POINT I.

Mandamus is not the proper remedy.

It is a well-settled doctrine, laid down by an unbroken line of decisions in the Supreme Court of the United States, that the writ of *mandamus* will not be

made to perform the office of an appeal or writ of error to review the action of an inferior court taken in the lawful exercise of its jurisdiction, or be issued to reverse or amend the decision of an inferior tribunal when the decision was within the scope of its jurisdiction.

The ordinary functions of a writ of *mandamus* directed to an inferior court is to command and compel action by the inferior court in cases where action should be properly taken by it, and to prevent the court below from exercising or attempting to exercise jurisdiction in cases where no such jurisdiction exists, as well as preventing abuses of judicial discretion.

In cases where the record discloses no lack of jurisdiction, and where judicial acts have been performed by the inferior court, these may not be reviewed in any other manner than that properly prescribed through writ of error or appeal.

In order to properly consider the true functions of the writ of *mandamus*, it is necessary to refer to the source of power for the issuing of the writ and the cases in which it has been exercised; but before referring to these cases, we wish to direct the attention of the Court to the particular action taken by the court below, and which is sought to be reviewed in this proceeding.

The suit, for the remand of which the motion was made and denied by the Circuit Court of the United States for the Southern District of New York, was originally commenced in the Supreme Court of the State of New York for the County of New York by the petitioner, a citizen of the State of New York and a resident of the Southern District, against The Wabash Railroad Company, a foreign corporation, and certain other defendants. Subsequently, a petition for the removal of this suit into the United States Circuit Court for the Southern District of New York was filed by the defendant The Wabash Railroad Company, on the ground that a separable controversy existed between the plaintiff and the defendant The Wabash Railroad Company, a complete determination of which could be had without the presence of any of the

other defendants, who were neither indispensable nor necessary parties to the complete determination of the separable controversy, which was solely between the plaintiff in said suit and the defendant The Wabash Railroad Company, citizens of different States.

Bond having been filed and approved, the action was removed into the United States Circuit Court for the Southern District of New York and a transcript of the record filed in that Court.

Subsequently, the plaintiff in said suit made a motion to remand the same into the Supreme Court of the State of New York, in and for the County of New York, which motion, having been argued, was denied, and an opinion delivered by said Court.

In the opinion of the United States Circuit Court denying the motion to remand to the state court, the right of the defendant The Wabash Railroad Company to remove the cause, on the ground stated in its petition for removal, is expressly upheld, the Court using the following language in its opinion, to which we call special attention :

It is manifest that complainant can obtain complete relief without the presence of these additional parties. When he shall, by action against the Wabash Company, have established the proposition that the new bonds and stock are void, he need not concern himself with the re-exchange of such as may have been delivered ; they will not constitute valid obligations against the railroad and therefore will not affect the value of his stock. Individual holders of such of the new securities as have been issued may be allowed to intervene at the discretion of the court, but their presence is not essential to the determination of the fundamental issues raised by the complaint. It is difficult to escape the conviction that these additional ' parties ' have been brought into the case with the sole purpose of preventing, if possible, the removal of the cause."

Statutes.

The power of the Supreme Court of the United States to issue writs of prohibition or *mandamus* is

found in Sec. 688, Revised Statutes of the United States, 2d Edition, as follows :

"The Supreme Court shall have power to issue writs of prohibition in the district courts, when proceeding as courts of admiralty and maritime jurisdiction ; and writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed under the authority of the United States, or to persons holding office under the authority of the United States, where a State, or an ambassador, or other public minister, or a consul or vice-consul is a party."

The present general jurisdiction of the Circuit Courts of the United States by original process is prescribed by the Act of March 3, 1875, ch. 137, as amended by the Act of March 3, 1887, ch. 373, Sec. 1, and the Act of August 13, 1888, ch. 866, Sec. 1 (1 Supplement Revised Statutes 611), which Section reads as follows :

"That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which controversy the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different States, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid."

The general right of removal into the Circuit Court of the United States is governed by the Act of March 3, 1875, ch. 137, Section 2, as amended by the Act of March 3, 1887, ch. 373, Sec. 1, and the Act of August 13, 1888, ch. 866, Sec. 1 (1 Supplement Revised Statutes, 612), by the first Section of which latter Act the second Section of the Act of 1875 was amended so as to read as follows :

"That any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the Circuit Courts of the United States are given original jurisdiction by the

preceding Section, (quoted above), which may now be pending, or which may hereafter be brought, in any State Court, may be removed by the defendant or defendants therein to the Circuit Court of the United States for the proper district.

"Any other suit of a civil nature, at law or in equity of which the circuit courts of the United States are given jurisdiction by the preceding Section, and which are now pending, or which may hereafter be brought, in any State Court, may be removed into the circuit court of the United States for the proper district by the defendant or defendants therein, being non-residents of that State.

"And when in any suit mentioned in this Section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the circuit court of the United States for the proper district.

* * * * * *

"Whenever any cause shall be removed from any State Court into any circuit court of the United States, and the circuit court shall decide that the cause was improperly removed, and order the same to be remanded to the State court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the circuit court so remanding such cause shall be allowed."

The last paragraph quoted above superseded and repealed Section 5 of the Act of 1875, in which it was provided that

"The order of said Circuit Court dismissing or remanding said cause to the State Court shall be reviewable by the Supreme Court on writ of error or appeal, as the case may be."

DECISIONS.

In the case of

United States vs. Lawrence,

[3 Dallas' Reports, 42],

which records the first application to the Supreme Court of the United States for a writ of *mandamus*, an attempt was made to use this writ to compel the

Honorable John Lawrence, Judge of the District of New York, to issue a warrant for apprehending Captain Barre as a deserter from the French frigate Le Perdrix, which warrant Judge LAWRENCE, after careful consideration, had refused to issue upon demand of the French Vice-Consul.

Reporter DALLAS' syllabus to this case is a terse and correct statement of the Court's decision and of a principle controlling the writ of *mandamus*, which has been since steadily adhered to by the Supreme Court :

"A *mandamus* will not be granted, to compel a judicial officer to decide otherwise than according to the dictates of his own judgment."

The Supreme Court in its opinion says [p. 53] :

"We are clearly and unanimously of opinion that a *mandamus* ought not to issue. It is evident, that the district judge was acting in a judicial capacity, when he determined, that the evidence was not sufficient to authorize his issuing a warrant for apprehending Captain Barre ; and (whatever might be the difference of sentiment entertained by this court) we have no power to compel a judge to decide according to the dictates of any judgment, but his own."

One of the earliest cases in which the writ of mandamus has been allowed by the Supreme Court is the case of

Ex Parte Bradstreet,

[7 Peter's Reports, 634],

where the District Court, having dismissed the case for want of jurisdiction, a motion was made to reinstate the case and to amend by inserting an averment correcting the jurisdictional objection, which motion was denied. The Supreme Court, in ordering the writ to issue, stated, through Chief Justice MARSHALL, that although the Supreme Court ought not to exercise any control over the proceedings of the District Court in allowing or refusing to allow amendments in the proceedings, still, in order that the right of every party to have the judgment of the Supreme Court in a suit brought by

him in one of the inferior courts of the United States, provided the matter in dispute exceeds the sum or value of $2,000, it was necessary to require the reinstatement of the case in the inferior court and a final judgment therein, in order that an appeal from such judgment might be had to the Supreme Court. The *mandamus* was issued for this purpose.

In the case of

Ex Parte Bradley,

[7 Wallace's Report, 364],

application was made to the Supreme Court for a writ of *mandamus* on behalf of Bradley, directed to the Supreme Court of the District of Columbia, to restore him to the office of attorney and counsellor in said court, from which he alleged that he had been wrongfully removed by it. It appeared that the said Supreme Court had issued a rule against Bradley reciting certain offensive language which, it alleged, he had used at the previous June Term of the Criminal Court, for which language the Criminal Court had entered a judgment ordering Bradley's name stricken from the rolls. The rule of the Supreme Court of the District of Columbia ordered that Bradley show cause why he should not be punished for contempt of that court.

The Supreme Court of the United States found that the Supreme Court of the District of Columbia was a different court from the Criminal Court, and that hence the former court had no power to disbar an attorney for a contempt of the latter.

In discussing the functions of the writ of *mandamus* Mr. Justice NELSON, in delivering the opinion of the Court, says [p. 377]:

"We are not concerned, however, to examine in the present case how far this Court would inquire into any irregularities or excesses of the Court below in the exercise of its discretion in making the order against the relator, as our decision is not at all dependent upon that question. * * * The ground of our decision upon this branch of the case is, that the Court below has no jurisdiction to disbar the relator for a contempt committed before another Court. The contrary must be maintained before this order can be upheld and the

writ of *mandamus* denied. No amount of judicial discretion of a court can supply a defect or want of jurisdiction in the case. The subject-matter is not before it; the proceeding is *coram non judice* and void.

" * * * The same principle is also stated by Chief Justice MARSHALL in *Ex parte* Burr. 'There is then,' he observed, 'no irregularity in the mode of proceeding which would justify the interposition of this Court. It could only interpose on the ground that the Circuit Court had clearly exceeded its powers, or, had decided erroneously on the testimony.' * * * So in *Ex parte* Secombe, Chief Justice TANEY, after showing that the question was one of judicial discretion, observes, '*We are not aware of any case where a mandamus has issued to an inferior tribunal, commanding it to reverse or amend its decision, when the decision was in its nature a judicial act, and within the scope of its jurisdiction and discretion.*'"

It will be seen that in this case the decision of the Supreme Court rested entirely upon the fact that the court below had, on the face of the record, no jurisdiction, that no amount of judicial discretion could supply this defect of jurisdiction, and that the subject matter was not before it.

In the case of

Insurance Company vs. Comstock,

[16 Wallace's Reports, 258]

a petition had been filed in the District Court for involuntary bankruptcy and exceptions taken to the rulings of the Court on the subject of the evidence and to its authority. After judgment, the cause was removed by writ of error to the Circuit Court having appellate jurisdiction, but the Circuit Court, without any consideration or examination of the exceptions taken or errors assigned, dismissed it for want of jurisdiction. Thereupon, a writ of error was taken to the United States Supreme Court. That Court dismissed the writ of error for want of jurisdiction, and stated that *mandamus* was the proper remedy. The reasons for this conclusion are summarized by Mr. Justice CLIFFORD (p. 270), where, in delivering the opinion of the Court, he says :

" Repeated decisions of this Court have established the rule that this Court has power to issue a mandamus, in the exercise of its appellate jurisdiction, and that the writ will lie in the proper case to direct a subordinate Federal court to decide a pending cause. Power to issue the writ of mandamus to the Circuit Courts is exercised by this court to compel the Circuit Court to proceed to a final judgment or decree in a cause, in order that this court may exercise the jurisdiction of review given by law ; and in the case of *Ex parte* Bradstreet, this Court decided, MARSHALL, C. J., giving the opinion of the court, that every party has a right to the judgment of this court in a suit brought by him in one of the inferior courts of the United States, provided the matter in dispute exceeds the sum or value of $2,000, and that the Court in such case will issue the writ to a Circuit Court or a District Court exercising Circuit Court powers, in a case where the subordinate court had improperly dismissed the case, requiring the Court to reinstate the case and to proceed to try and adjudge the issues between the parties."

It will be observed that the Supreme Court in this case acted upon the same principle as controlled its action in the case of *ex parte* Bradstreet, namely, that it was the duty of the inferior court to decide the case before it, and render such judgment therein as might enable the parties to exercise their right of appeal to the Supreme Court of the United States. In neither of these cases was the inferior court directed to decide the case before it in a certain manner or in favor of one of the parties, but was simply ordered to discharge its duties and decide the case one way or the other, and not to dismiss it without entering judgment, thus defeating the right of appeal.

The case of

Railroad Company vs. Wiswall,

[23 Wallace's Reports, 507.]

is one in which a citizen of Illinois sued, in one of the inferior State courts, the Chicago and Alton Railroad Company. That company secured an order from the Circuit Court of the United States for the Southern District of Illinois commanding the State Court to send the

record to it. This the State Court did. Subsequently, however, the Circuit Court, being satisfied that it had no jurisdiction, on motion of the plaintiff, remanded the case to the State Court. To that remanding order the railroad company took a writ of error, and the plaintiff moved in the Supreme Court to dismiss the writ, the ground of the motion being that the remanding order was not a final judgment or decree, and that the proper proceeding of the Company was a motion for *mandamus* to the Court below to act and not by writ of error to review what was done.

Chief Justice WAITE, in reading the opinion of the Court, says (p. 508):

"The writ of error is dismissed upon the authority of Insurance Company vs. Comstock. The order of the Circuit Court remanding the cause to the State court is not a final judgment in the action, but a refusal to hear and decide. The remedy in such a case is by mandamus to compel action, and not by writ of error to review what has been done."

Here again it will be noted that the command to the Circuit Court is to hear and decide, and the writ of error is denied because no reviewable decision has been made. This case consistently follows the rule laid down in the former cases above referred to.

In the case of

Ex parte Loring,

[94 U. S., 418.]

there was a petition for a *mandamus* to the Circuit Court of the United States for the Eastern District of Michigan. It appears that an action was brought in that Court, and that after a jury had been impaneled and testimony on the part of the plaintiff concluded, he elected to take a non-suit and that a judgment to that effect was entered. Subsequently, the plaintiff moved to set aside this judgment and restore the case to the docket for trial. This motion was granted, and the defendant appeared and moved to vacate the order made. The motion to vacate was denied and the petition for the writ of *mandamus* was filed to require the

Circuit Court to vacate the order setting aside the nonsuit.

In denying the petition for the writ of mandamus, Mr. Chief Justice WAITE, delivering the opinion of the Court, said (p. 419):

"It seems clear to us that the object in this case is to use the writ of *mandamus* as a writ of error. This cannot be done. *We may require the Circuit Court to decide in a proper case if it refuses to act, but cannot control its decision.* Here the Court has acted, and given its decision upon a motion made. We are asked now to require it to reverse that decision. For that, resort must be had to a writ of error after a final judgment has been rendered. The writ of *mandamus* has no such office to perform."

In the case of

Virginia vs. Rives,

[100 U. S., 313.]

application was made to the Supreme Court for a writ of mandamus upon the following facts:

The case was brought in the Circuit Court of the State of Virginia upon an indictment for murder, and, having come to trial, the defendants moved the court that the jury be modified so as to allow one-third thereof to be composed of colored men. This motion was overruled, and thereupon the defendants, before trial, filed another petition praying for a removal of the case into the Federal Court. The petition alleged that the right secured to the petitioners by law providing for the equal civil rights of all the citizens of the United States was denied to them by reason of the denial of their motion. Petition for removal was denied by the State Court, and the case proceeded to trial and the defendants were convicted. Subsequently a copy of the record was obtained, and the cases upon petition were ordered to be docketed in the Circuit Court of the United States, and a writ of *habeas corpus* was issued by virtue of which the defendants were taken into the custody of the United States Marshal. No motion was made in the Circuit Court to remand the prosecutions to the State Court, but the Commonwealth

of Virginia appealed to the Supreme Court for a rule to show cause why a *mandamus* should not issue commanding the Federal Court to order the re-delivery of the bodies of the defendants to the State officers.

The Supreme Court in allowing the writ, holds that no case for removal is made out by the petition inasmuch as there is no allegation of any laws of the State of Virginia denying to the petitioners their civil rights in the judicial tribunals of the State, this being the ground upon which the removal is sought, and that the improper and unwarranted acts of the State officers were, if true, a criminal misuse of the State law but could not be said to be a denial or disability to enforce in the judicial tribunals of the State the rights of colored men as contemplated by the removal act. In passing on this question the Court, speaking through Mr. Justice STRONG, says (p 321):

"It is to be observed that act gives the right of removal only to a person 'who is denied, or can not enforce, *in the judicial tribunals of the State* his equal civil rights,' and this is to appear before the trial. When a statute of the State denies his right, or interposes a bar to his enforcing it, in the judicial tribunals of the State the presumption is fair that they will be controlled by it in their decisions; and in such a case, a defendant may affirm on oath what is necessary for a removal. Such a case is clearly within the provisions of sec. 641. But, when a subordinate officer of the State, in violation of a law, undertakes to deprive an accused party of a right which the statute law accords to him, as in the case at bar, it can hardly be said that he is denied, or can not enforce, in the judicial tribunals of the State the rights which belong to him. In such a case it ought to be presumed the court will redress the wrong. If the accused is deprived of the right, the final and practical denial will be in the judicial tribunal which tries the case, after the trial was commenced."

It will be noted that in this case the Supreme Court bases its decision upon the fact that the petition for removal does not itself assert the existence of the conditions required by the removal act in order to permit the removal of the case and that, it being ap-

parent that these conditions do not exist, the Circuit Court is consequently without power to assume jurisdiction of the case.

In discussing the office of the writ of *mandamus*, the cases in which the same will be issued, and the purposes for which intended, the Court says, speaking through Mr. Justice STRONG (p. 323):

"In what case such a writ is warranted by the principles and usages of law it is not always easy to determine. Its use has been very much extended in modern times, and now it may be said to be an established remedy to oblige inferior courts and magistrates to do that justice which they are in duty, and by virtue of their office, bound to do. It does not lie to control judicial discretion, except when that discretion has been abused; but it is a remedy when the case is outside of the exercise of this discretion, and outside the jurisdiction of court or officer to which or to whom the writ is addressed. One of its peculiar and more common uses is to restrain inferior courts and keep them within their lawful bounds."

A case in which the facts are practically identical with the facts in the present case is that of

Ex parte Hoard,

[105 U. S., p. 578.]

In that case it appeared that the Chesapeake and Ohio Railroad Company began a suit in a State Court of West Virginia to appropriate lands for the use of its road. The Company, at a certain stage of the proceedings, filed a petition, under the then existing Removal Act of 1875, for the removal of the suit to the District Court of the United States for the District of West Virginia. After the petition was filed and security given, a copy of the record of the suit in the State Court was filed in the District Court and the case docketed there. This having been done, certain of the defendants moved the District Court to remand the case and strike it from the docket, and this motion, having been argued and considered, was denied. Thereupon the moving defendants petitioned the Supreme Court for a writ of *mandamus* requiring the District Court to grant their motion. In denying the petition

this Court, speaking through Mr. Chief Justice WAITE, reviewed the prior decisions of the Court and said (p. 579) :

" Before the act of 1875, it was held, in *Insurance Company vs. Comstock* (16 Wall. 258), followed in *Railroad Company vs. Wiswall* (23 *id.*, 507), that if a Circuit Court refused to take jurisdiction of a suit which had been properly removed, the remedy was by *mandamus* from this court 'to compel the Circuit Court to proceed to a final judgment or decree,' and not by writ of error or appeal. This was on the authority of *Ex parte Bradstreet* (7 Pet. 633), in which Mr. Chief Justice MARSHALL delivered the opinion. No case can be found, however, in which a *mandamus* has been used to compel a court to remand a cause after it has once refused a motion to that effect. The distinction is obvious. An order remanding a cause is not a final judgment or decree, from which ordinarily an appeal or writ of error can be taken ; and in *Ex parte Bradstreet* it was stated, as the reason for allowing the *mandamus*, 'that every party has a right to the judgment of this court in a suit brought by him in one of the inferior courts of the United States, provided the value of the matter in dispute exceeds the sum or value of Two Thousand Dollars,' now, of course, Five Thousand. If the cause be retained, it may go to final judgment or decree, and the reason assigned for the *mandamus* in case of dismissal does not exist. If it be improperly retained and the objection presented on the record, the question may be brought here for review after final judgment, if the amount involved is sufficient to give us jurisdiction. We so held at this term in *Railroad Company vs. Koontz*, 104 U. S. 5.

It is of no importance that the value of the matter in dispute may be less than $5,000. Jurisdiction has been given to the Circuit Court to determine whether the cause is one that ought to be remanded. The act of 1875 has given an appeal or a writ of error to this court for the review of orders to remand, without regard to the amount involved (*Babbitt vs. Clark*, 103 *id.* 606).

The same remedy has not been given if the cause is retained. It rests with Congress to determine whether a cause shall be reviewed or not. If no power of review is given, the judgment of the court having jurisdiction to decide is final (*Ex parte Ferry Company*, 104 *id.* 519).

It is an elementary principle that a *mandamus* can not be used to perform the office of an appeal or a writ of error *(Ex parte Loring*, 94 *id.* 418).

Without determining, therefore, whether the case was properly removed or not, the writ is denied."

This case was decided while the Act of 1875 was in force giving the right to appeal by writ of error from an order remanding a case to the State Court, but it will be observed that this writ, the Court says, is given so that a review of such a decision may be had which would not otherwise exist and that the same right of appeal was not given by the Act of 1875 to review an order refusing to remand a case because that order would ultimately be reviewable by the Supreme Court after final judgment and appeal to it.

In

In re Pennsylvania Company, Petitioner

[137 U. S., 451],

a petition for *mandamus* to the Judges of the Circuit Court of the United States for the District of Connecticut, to compel said Court to take jurisdiction of a suit of one Roraback, was denied. It appears that the suit was commenced in the Court of Common Pleas for Litchfield County, Connecticut. The demand was for the sum of $500. The defendant corporation filed a petition for the removal of the suit to the United States Circuit Court on the ground of prejudice and local influence, filing therewith proper affidavit and bond. The Company entered in the Circuit Court a copy of the record and also filed a petition reciting previous steps, and re-alleging the ground for removal, and praying the Court to take jurisdiction of the suit. Thereafter the plaintiff moved to remand on the ground that the amount in controversy did not exceed the sum of $2,000 inclusive of interest and costs.

The Circuit Court granted the application and made an order remanding the case and refused to take jurisdiction.

In denying a writ of mandamus directing the reinstatement of the case, the Supreme Court, speaking by Mr. Justice BRADLEY, says (p. 452):

"The first question to be decided is, whether this Court has power to grant the writ applied for. The general power of the Court to issue a writ of mandamus to an inferior court, to take jurisdiction of a cause when it refuses to do so, is settled by a long train of decisions (*Ex parte Bradstreet*, 7 Pet. 634; *Life and Fire Ins. Co. vs. Wilson*, 8 Pet. 291; *United States vs. Gomez*, 3 Wall. 752; *Ex parte Roberts*, 15 Wall. 384; *Ex parte United States*, 16 Wall. 699, 702; *Ins. Co. vs. Comstock*, 16 Wall. 258, 271; *Railroad Co. vs. Wiswall*, 23 Wall. 507; *Ex parte Schollenberger*, 96 U. S. 369; *Harrington vs. Holler*, 111 U. S. 796; *Ex parte Brown*, 116 U. S. 401; *Ex parte Parker*, 120 U. S. 737; *Ex parte Hollon Parker*, 131 U. S. 221).

It is true that after a case has proceeded to the filing of a declaration and plea to the jurisdiction, or its equivalent, and a judgment in favor of the plea and a consequent dismissal of the action, this court has held that the plaintiff is confined to his remedy by writ of error, and cannot have a mandamus, which only lies, as a general rule, where there is no other adequate remedy (*Ex parte Balt. & Ohio Railroad*, 108 U. S., 566; *Ex parte Railway Co.*, 103 U. S. 794).

But it was expressly held in *Railroad Co. v. Wiswall*, 23 Wall. 507, that a mandamus would lie to compel a Circuit Court to take jurisdiction of and proceed with a case which it had wrongfully remanded to the state court. The reason was that an order to remand was not a final judgment, and no writ of error would lie. This case is supported by the rule laid down by Chief Justice MARSHALL in *Ex parte Bradstreet*, 7 Pet., 634; and if the decision of the present case depended only on the general rule, the power of the court to issue the mandamus would be undoubted.

But in our opinion, the matter is governed by statute. This will be manifest by reference to previous legislation on the subject. The 5th section of the act of March 3, 1875, (determining the jurisdiction of the Circuit Courts), provided that the order of the Circuit Court dismissing or remanding a cause to the state court should be reviewable by the Supreme Court on writ of error or appeal, as the case might be. 18 Stat. 470, 472, c. 137. This act remained in force until the passage of the act of March 3, 1887, by which it was superseded, and the writ of error or appeal

upon orders to remand causes to the state courts, was abrogated."

After quoting the amendment of 1887–88, which is set forth above, Mr. Justice BRADLEY continues (p. 454):

"In terms, it only abolishes appeals and writs of error, it is true, and does not mention writs of mandamus; and it is unquestionable a general rule, that the abrogation of one remedy does not affect another. But in this case, we think it was the intention of Congress to make the judgment of the Circuit Court remanding a cause to the state court final and conclusive. The general object of the act is to contract the jurisdiction of the federal courts. The abrogation of the writ of error and appeal would have had little effect in putting an end to the question of removal, if the writ of mandamus could still have been sued out in this court. It is true that the general supervisory power of this court over inferior jurisdictions is of great moment in a public point of view, and should not, upon light grounds, be deemed to be taken away in any case. Still, although the writ of mandamus is not mentioned in the section, yet the use of the words 'such remand shall be immediately carried into execution,' in addition to the prohibition of appeal and writ of error, is strongly indicative of an intent to suppress further prolongation of the controversy by whatever process. We are, therefore, of opinion that the act has the effect of taking away the remedy by mandamus as well as that of appeal and writ of error."

The next case in point of time is

Virginia vs. Paul,

[148 U. S., 107.]

which arose upon a petition by the Commonwealth of Virginia to the Supreme Court for a writ of mandamus to the Honorable John Paul, District Judge of the United States for the Western District of Virginia, holding Circuit Court, to command him to remand to the County Court of Smyth County, Virginia, an indictment against Joseph H. Carrico for the murder of James N. Nelson, found by the Grand Jury of that County and of which the Circuit Court of the United States had assumed jurisdiction under what purported

to be a petition for removal ; also to command him to restore the body of Carrico to the jailor of Smyth County from whose custody he had been taken upon a writ of *habeas corpus* issued by Judge PAUL.

The petition was based upon section 643 of the Revised Statutes authorizing the removal into the Circuit Court of the United States for trial of "any civil suit or criminal prosecution" "commenced in any court of a state against any officer appointed under or acting by authority of any revenue law of the United States, now or hereafter enacted, or against any person acting under or by authority of any such officer, on account of any act done under color of his office or of any such law, or on account of any right, title or authority claimed by such officer or other person under any such law."

The petition was sworn to on December 12, 1891, alleging that KIRK, Justice of the Peace of Smyth County, on that day issued his warrant to the constable to arrest the petitioner and bring him before the Justice on a charge of the murder of Nelson, and that the petitioner had been arrested by the constable on that warrant and was now confined in the County jail "awaiting a trial before such Justice on the charge of murder."

The petition for removal did not, therefore, seek to transfer the indictment from a State Court of competent jurisdiction, but from a Justice whose only authority was to commit the accused to await action by the Grand Jury.

In granting the writ of *mandamus* the Supreme Court, speaking by Mr. Justice GRAY, says (p. 115):

"It is important, therefore, to consider whether the conditions of that section have been complied with. By that section, it is only when the suit or prosecution has been 'commenced in any court of a State,' and 'at any time before the trial for final hearing thereof,' that it 'may be removed for trial into the Circuit Court' 'upon the petition of such defendant to said Circuit Court, and in the following manner'; 'the petition must set forth the nature of the suit or prosecution, and be verified by affidavit, and supported by certificate of coun-

sel. It 'shall be presented to the said Circuit Court, if in session, or if it be not, to the clerk thereof at his office and shall be filed in said office.' 'The case shall thereupon be entered on the docket of the Circuit Court, and shall proceed as a case originally commenced in that court.' The clerk of the Circuit Court is required, when a case is commenced in a state court otherwise than by *capias*, to issue a writ of *certiorari* to the state court for the record; and, when it is commenced by *capias*, to (issue a writ of *habeas corpus cum causa*), a duplicate of which shall be delivered to the clerk of the state court or left at his office by the Marshal'; 'and thereupon it shall be the duty of the state court to stay all further proceedings in the cause, and the suit or prosecution, upon delivery of such process, or leaving the same as aforesaid, shall be held to be removed to the Circuit Court, and any further proceeding, trial or judgment therein in the state court, shall be void.'" Continuing, he says (p. 122): "It appearing upon the face of the petition for removal, as well as by the copies of records laid before this court, that no prosecution had been commenced in the state court, withing the meaning of section 643 of the Revised Statutes, when the petition for removal was drawn up and sworn to, nor even when it was filed in the Federal Court, the prosecution subsequently commenced by the presentment of an indictment in the state court was never lawfully removed into the Circuit Court of the United States; for, in all cases of removal from the state courts, the jurisdiction of the Circuit Court of the United States rests and depends upon the statements made in the petition for removal, and verified by the affidavit of the petitioner (*Virginia vs. Rives*, 100 U. S. 313, 316; *Crehore vs. Ohio & Mississippi Railway*, 131 U. S., 240; *Graves vs. Corbin*, 132 U. S, 571. 590).

The result is that the Circuit Court of the United States has, without authority of law, assumed jurisdiction of an indictment found in the courts of the State of Virginia for a crime against the laws of the State, and that the State is entitled to have the prosecution remanded to its courts to be there dealt with according to law. For aught that appears on this record, the State is not bound to commence or to carry on the prosecution in the courts of another government, but is entitled to resume its own rightful jurisdiction and authority, and to try the offender in its own courts. If the case should be allowed to proceed in the Circuit

Court of the United States, and should finally result in an acquittal of the charge, in whole or in part, the State could not have a writ of error to review the judgment (*United States vs. Sanges*, 144 U. S. 310).

A stronger case for issuing a writ of mandamus can hardly be imagined. The writ may be directed to the judge who has unlawfully assumed jurisdiction of the prosecution; and no previous motion to him to remand the case was necessary. The case is governed in every particular by (*Virginia vs. Rives*, 100 U. S. 313, 316, 323, 324").

It should be observed that in this case the petition for removal did not in any particular meet the requirements of the statute. It affirmatively appears, therefore, that not only had the Circuit Court exercised no judicial discretion in retaining jurisdiction but there were no facts stated in the petition bringing the case within the provisions of the statute authorizing such discretion to be exercised. In other words, the case sought to be removed to the Federal Court did not come within the provisions of that statute under any interpretation of the facts of the case.

In

In re Hohorst, Petitioner

[150 U. S. 653],

a state of facts similar to those in *ex parte* Bradstreet, is presented. An order having been granted dismissing a case for want of jurisdiction, the petitioner applied for a writ of *mandamus* directing the judges of the Circuit Court for the Southern District of New York, to take jurisdiction and proceed against the defendant and to strike from the record an order dismissing the suit, an appeal from which had been disallowed for want of jurisdiction because that order was not a final one from which an appeal would lie.

Tha Supreme Court granted the writ of *mandamus*.

In stating the opinion of the Court, Mr. Justice GRAY says [p. 663]:

"The Hamburg-American Packet Company, being liable to this suit in the Circuit Court of the United States for the Southern District of New York if

duly served with process in the District, and having been so served, and the order of that Court dismissing the suit as against the corporation not being reviewable on appeal at this stage of the case, there can be no doubt that mandamus lies to compel the Circuit Court to take jurisdiction of this suit as against the corporation (*Railroad Co. vs. Wiswall*, 23 Wall. 507; *Ex parte Schollenberger*, 96 U. S. 369; *In re Pennsylvania Co*, 137 U. S. 451, 452").

In

In re Rice, Petitioner

[155 U. S. 396],

an attempt was made to secure a review by prohibition and *mandamus* of a decretal order, final in character and reviewable by appeal, and upon the principles stated in the foregoing cases the writs were denied. The following language is used by Mr. Chief Justice FULLER in delivering the Court's opinion [p. 402]:

"1. Where it appears that the court whose action is sought to be prohibited had clearly no jurisdiction of the case originally, or of some collateral matter arising therein, a party who has objected to the jurisdiction at the outset and has no other remedy is entitled to a writ of prohibition as a matter of right. But where there is other legal remedy, by appeal or otherwise, or where a question of the legal jurisdiction of the Court is doubtful, or depends upon facts which are not made matter of record, or where the application is made by a stranger, the granting or refusal of the writ is discretionary. Nor is the granting of the writ obligatory where the case has gone to sentence and the want of jurisdiction does not appear upon the face of the proceeding (*Smith vs. Whitney*, 116 U. S. 167, 173; *In re Cooper*, 143 U. S. 472, 495). Tested by these rules we are clear that a proper case is not made for awarding a writ of prohibition.

2. *The writ of mandamus cannot be issued to compel the court below to decide a matter before it in a particular way, or to review its judicial action had in the exercise of legitimate jurisdiction. The writ cannot be used to perform the office of an appeal or writ of error, even if no appeal or writ of error is given by law* (*American Construction Company vs. Jacksonville Railway*, 148 U. S. 372, 379).

The Circuit Court has proceeded to judgment in the premises, and we cannot revise and reverse its decision

by resort to this writ in the manner proposed, nor can we command it to adjudicate upon the rights of parties not before it by directing it to cause securities which may have been deposited, to be returned to their owners and to restore the parties to their original positions."

In

In re Atlantic City Railroad,

[164 U. S., 633],

an application was made for leave to file a petition for a writ of *mandamus* directing the United States Circuit Court for the Eastern District of Pennsylvania to dismiss an action against the applicant for want of jurisdiction. The applicant alleged that it had a defense to the action on the merits but was advised "that if it enters a general appearance or files an answer in the said case, it will thereby and by that act and fact forever waive all objection to the jurisdiction of said Court and this Court will be forever ousted of its jurisdiction to determine the jurisdiction of said Court in said case and that, accordingly, your petitioner has no adequate remedy unless this Court will grant the *mandamus* as herein petitioned."

In denying leave to file the petition, the Supreme Court, speaking by Mr. Chief Justice FULLER, says (p. 635):

"The general power of the court to issue a writ of *mandamus* to an inferior Court, to take jurisdiction of a cause where it refuses to do so, is settled by a long train of decisions; but mandamus only lies, as a general rule, where there is no other adequate remedy; nor can it be availed of as a writ of error (*In re Pennsylvania Co., Petitioner*, 137 U. S. 451; *In re Morrison, Petitioner*, 147 U. S. 14; *Ex parte Railway Company*, 103 U. S. 794; *Ex parte Baltimore & Ohio Railroad Co.*, 108 U. S. 566).

In *In re Hohorst, Petitioner*, 150 U. S. 653, the bill was filed in the Circuit Court of the United States for the Southern District of New York against a corporation and certain other defendants, and was dismissed against the corporation for want of jurisdiction. From that order complainant took an appeal to this court, which was dismissed for want of jurisdiction because the order, not disposing of the case as

to all of the defendants, was not a final decree from which an appeal would lie (148 U. S. 262). Thereupon an application was made to this Court for leave to file a petition for a writ of *mandamus* to the judges of the Circuit Court to take jurisdiction and to proceed against the Company in the suit. Leave was granted and a rule to show cause entered thereon, upon the return to which a writ of *mandamus* was awarded.

In this case, however, the Circuit Court entertained jurisdiction and the petitioner has its remedy by appeal if a decree should pass against it. The objection to the jurisdiction presented by filing the demurrer for the special and single purpose of raising it, would not be waived by answering to the merits upon the demurrer being overruled *(Southern Pacific Company vs. Denton*, 146 U. S. 202).

To direct the exercise of jurisdiction is quite different from a mandate not to do so, and we think we should not interpose at this stage of the case in the manner desired."

In

In re Grossmayer, Petitioner.
[177 U. S. 48],

a *mandamus* was sought against a District Judge of the United States for the Eastern District of Texas, holding Circuit Court, compelling him to enter judgment by default for the petitioner in an action brought by him in that Court.

It appears that the petitioner, a citizen of Texas, brought an action at law in said Circuit Court to recover damages against Robert G. Dun, a citizen of New York, and Robert D. Douglass, a citizen of New Jersey, alleging that the defendants carried on business in that District as an association under the name of R. G. Dun and Company, and prayed for summons to said Dun and Company to be served on Fowler, alleged to be a resident of Galveston, and Local Agent of said Dun and Company. The summons was issued and served. The defendants filed no plea, answer or demurrer, and the plaintiff moved for a judgment by default. The defendants then appeared specially and pleaded to the jurisdiction of the Court because the defendants were not a corporation but were

private individuals, and, in support of this plea, filed an affidavit of Fowler to the truth of the facts stated. The motion for judgment by default was denied and an order denying the motion was entered. The Supreme Court held that the Circuit Court had no jurisdiction of the action for want of due service upon the defendant, but stated that if proper service had been made, *mandamus* would have been the appropriate remedy.

Mr. Justice GRAY, speaking for the Supreme Court, says [p. 49]:

"The objection to the form of remedy can not be sustained. A writ of mandamus, indeed, can not be used to perform the office of an appeal or writ of error, to review the judicial action of an inferior court. A final judgment of the Circuit Court of the United States for the defendant upon a plea to the jurisdiction can not therefore be reviewed by a writ of mandamus. But if the court, after sufficient service on the defendant, erroneously declines to take jurisdiction of the case or to enter judgment therein, a writ of mandamus lies to compel it to proceed to a determination of the case, except where the authority to issue a writ of mandamus has been taken away by statute (*Ex parte Schollenberger*, 96 U. S. 369; *Pennsylvania Co., petitioner*, 137 U. S., 451, 453; *American Construction Co. vs. Jacksonville* etc., *Railway*, 148 U., S., 372, 379; *Hohorst, petitioner*, 150 U. S. 653, 664).

In *Goldey vs. Morning News*, 156 U. S. 518, cited for the respondent, which was brought to this Court by writ of error, the Circuit Court had entered a final judgment in favor of the defendant, setting aside the summons and relieving the defendant from appearing to answer the complaint. But in the case now before us that court has done no more than to decline to enter a judgment in favor of the plaintiff. The plaintiff could not sue out a writ of error before a final judgment had been entered against him; and he could not compel the Circuit Court to proceed to final judgment, otherwise than by a writ of mandamus."

The case of

Kentucky vs. Powers,
[201 U. S. 1]

is similar in many respects to the case of Virginia vs. Rives, *supra*, and the writ of *mandamus* remand-

ing the prosecution to the State Court, as well as the other relief granted by the Supreme Court, is based entirely upon the principle that upon the record of the proceedings the removal of the criminal prosecution into the Federal Court was unauthorized by any statute of the United States.

The case arose out of a criminal prosecution commenced in one of the State Courts of Kentucky, in which the defendant filed a petition for removal into the Federal Court, on the ground that he was denied and could not enforce in the judicial tribunals of the State his equal civil rights under the laws of the United States.

It does not appear from the petition for removal, or from any part of the record, that any statutory or constitutional provision of the State of Kentucky existed which denied or attempted to deny any such civil rights, but that the alleged discrimination in respect of such rights was due to alleged illegal, corrupt or unauthorized acts of administrative and judicial officers.

The Supreme Court exhaustively reviews the cases discussing this question, and clearly draws the distinction between a denial of civil rights by the constitution and laws of the State and such denial by acts of administrative and judicial officers, and points out that the denial must be by existing statute or constitutional provision, in order that a case may be made to fall within the removal acts (Sections 641, 642, of the Revised Statutes).

As a fundamental test of the right of removal, the Court says, at page 24 :

"The adjudged cases make it clear that whatever the nature of a civil suit or criminal proceeding in a state court, it cannot be *removed* into a Federal court unless warrant therefor be found in some Act of Congress."

The whole question involved in this case is whether the Federal Court can assume jurisdiction of a case in which it appears from the record that the grounds of removal expressly required to exist do not exist, and where no judicial act upon the part of the in-

ferior court has been or could be taken which would, if taken, confer upon the inferior court the right to proceed with the case. The decision is based entirely upon the ground that authority for the removal of the case was entirely lacking, as disclosed by the record.

The most recent case in which the writ of *mandamus* has been utilized in securing the remand to a State Court of a case over which the inferior Federal Court had no jurisdiction, is that of

Ex Parte Wisner,

[203 U. S. 449.]

In that case Wisner, a citizen of the State of Michgan, commenced an action at law in the Circuit Court for the City of St. Louis, State of Missouri, against Beardsley, a citizen of the State of Lousiana. After service of the summons upon Beardsley, he filed his petition to remove the action from the State Court into the Circuit Court of the United States for the Eastern District of Missouri, on the ground of diversity of citizenship; and bond having been filed, an order of removal was entered by the State Court and transcript of the record was filed in the Circuit Court of the United States. Wisner forthwith moved to remand the case upon the ground that the suit did not involve a controversy within the jurisdiction of the Court, and that it appeared upon the face of the record that the plaintiff was a citizen and resident of the State of Michigan and the defendant a citizen and resident of the State of Louisiana, and that the cause was not one within the original jurisdiction of the Court. The motion to remand was denied, and Wisner applied to the United States Supreme Court for a writ of mandamus, and subsequently the mandamus was awarded by the Supreme Court.

The Supreme Court bases its decision entirely upon the well settled principle that no action is removable under the provision of the removal statute relied upon, unless it be one that the plaintiff could have brought originally in the inferior Federal Court, and that it is apparent from the record in the case that this could

not have been done in the action before it. It points out that, on account of the diversity of citizenship, neither one of the parties being a citizen or inhabitant of the district into which the case was removed, the case could not have been brought originally in the Federal Court, for that district, nor could the Court have obtained jurisdiction of the action with the consent of both parties. The Court emphasizes this view by referring to the case of Shaw against Quincy Mining Co., 145 U. S., 444, where it is said, in discussing the jurisdiction of the Circuit Courts, that

"* * * where the jurisdiction is founded solely upon the fact that the parties are citizens of different States, the suit may be brought in the district in which either the plaintiff or the defendant resides."

In applying this principle to the case before it, the Court says, at page 460:

"In the present case, neither of the parties was a citizen of the State of Missouri, in which State the suit was brought, and, therefore, it could not have been brought in the Circuit Court in the first instance."

The conclusion reached by the Supreme Court is that the case should have been remanded for the reason that the Circuit Court had no jurisdiction to proceed with it, and on the face of the record could not have acquired such jurisdiction, either originally or consequently, through removal.

The distinction between the Wisner case and the present one is apparent. In the Wisner case the utter absence of jurisdictional requirements appears on the face of the record, or, rather, allegations there appear which affirmatively show that the action is not one which could have been originally brought in the forum to which it was removed. No judicial action or decision upon the part of the inferior court is reviewed or reversed, or even considered, and the case is not directed to be remanded on the ground of erroneous judicial decision or action, but rather, on the ground of

the impossibility of any judicial action or decision at all being taken or made by the inferior Federal Court, for the reason that there being utter lack of jurisdiction apparent from the record, no action upon the part of the Federal Court could be validly taken. The removal proceedings on their face were defective, and for this reason had no more effect to give jurisdiction to the Circuit Court than would result from the service of a defective warrant or other process.

In the present case the removal is prayed for and granted upon the ground that the removing defendant is the only defendant whose presence upon the record is necessary for the complete determination of a controversy solely between it and the plaintiff. If this contention is correct, there is no doubt but that the action is one of which the Circuit Court could have originally obtained jurisdiction.

The plaintiff, a citizen and resident of the Southern District of New York, could have originally sued The Wabash Railroad Company, a citizen of Ohio, in the United States Circuit Court for the Southern District of New York, to annul its corporate action, upon the ground that such action was expressly prohibited by its charter. Such action could have been instituted by the plaintiff against The Wabash Railroad Company as the sole defendant in said Court. See *McCormick Harvesting Machine Company vs. Walthers*, 134 U. S., 41; *St. Louis and San Francisco Railway Company vs. McBride*, 141 U. S., 127; *Mexican Central Railway Company vs. Eckman*, 187 U. S., 429; *Dinzy vs. Illinois Central Railroad Company*, 61 Fed. Rep., 49.

The question as to whether or not the contention is a a sound one, is a question which has received judicial construction and determination by the Federal Court below upon the decision of the motion to remand, and a judicial act which is within the scope of the jurisdiction of the Court below has resulted from that Court's decision, which, if erroneous, may be properly reviewed by this Court upon writ of error after final judgment has been entered in the case.

To pass upon the correctness or incorrectness of the

judicial act at this time and in this manner, would result in the employment of a writ of *mandamus* in a manner which this Court has repeatedly disapproved of and condemned, and would be seeking through the use of the writ to amend or reverse a decision of an inferior tribunal, which in its nature is a judicial act and within the scope of its jurisdiction.

The following cases, decided by the Circuit Court of Appeals for the Eighth Circuit, aptly discuss the question of the use of writs of *mandamus* to review proceedings in inferior tribunals :

In the case of

United States vs. Judges of the United States Court of Appeals of Indian Territory,

[85 Fed Rep., 177,]

a petition was filed by one Harless upon which the United States Circuit Court of Appeals issued to the Judges composing the United States Circuit Court of Appeals in the Indian Territory its alternative writ of *mandamus* commanding them to admit the relator to bail during the pendency of his appeal to that Court from a judgment of conviction rendered against him on July 10, 1897, by the United States Circuit Court in the Indian Territory, or to show cause why they refused to do so. A return was made, and the relator then moved for a peremptory writ. It appeared that the relator was convicted in the United States Circuit Court in the Indian Territory of the crime of receiving stolen property ; that he appealed from that judgment to the United States Court of Appeals in the Indian Territory ; that while this appeal was pending he applied to the judge before whom he had been tried to be admitted to bail pending his appeal, and his application was denied ; that he then filed in the United States Court of Appeals in the Indian Territory a petition for a writ of *habeas corpus* and for admission to bail pending his appeal in that Court. His petition was heard by that Court and was dismissed. The appeal from the judgment of conviction was still

pending and undetermined in the United States Circuit Court of Appeals in the Indian Territory.

In denying the motion for peremptory writ of mandamus, the Circuit Court of Appeals, speaking through SANBORN, Circuit Judge, says, at page 179:

"Moreover, the question whether the relator is entitled to be admitted to bail while his appeal is pending in the United States court of Appeals in the Indian Territory is a judicial question which has already been decided by that court after full argument, and the only purpose which the relator seeks to accomplish by this writ is to obtain a review of that decision by this court, and its direction to the court below to reverse the judicial decision it has already rendered. But the writ of mandamus may not be made to perform the office of an appeal or of a writ of error to review the action of a court in the lawful exercise of its jurisdiction, nor can it issue to command a court or an officer to decide a judicial question in a particular way; much less may it be invoked to direct such a court or officer to reverse a decision of a judicial question which has already been rendered. *In re* Rice, 155 U. S., 396, 403, 15 Sup. Ct., 149; American Const. Co. v. Jacksonville, T. & K. W. Ry. Co., 148 U. S. 372, 379, 13 Sup. Ct., 758; *In re* Parsons, 150 U. S. 150, 156, 14 Sup. Ct., 50; *Ex parte* Morgan, 114 U. S., 174, 5 Sup. Ct. 825; *Ex parte* Whitney, 13 Pet. 404."

In the case of

Kimberlin vs. Commission to Five Civilized Tribes, et al.

[104 Fed. Rep., 653,]

a writ of mandamus was sought directed to the Commission commanding it to enroll the applicant as a citizen of the Chickasaw Nation. The facts under which the applicant claimed, were presented by a petition to the Commission, and the Commission refused to enroll the applicant. Thereupon the applicant filed a complaint for a mandamus in the United States Court in the Indian Territory, which Court subsequently denied the application. This decision was removed by writ of error to the United States Court of Appeals in Indian Territory, where it was affirmed.

In delivering the opinion of the Circuit Court of Appeals affirming the judgment of the courts below, SANBORN, Circuit Judge, says (p. 655):

"The writ of mandamus issues to compel the performance of a plain duty imposed by law. Where that duty is the exercise of judgment or discretion by an officer in the decision of a question of law or fact, or both, it may issue to compel a decision, but it may not command him in what particular way that decision shall be rendered. When a question has been decided by the officer or person to whose judgment or discretion the law has intrusted its determination, the writ of mandamus may not issue to review or reverse that decision, or to compel another. It may issue to command judicial officers to hear and to decide a question within their jurisdiction, but courts have no power by writ of mandamus to direct such officers how they shall decide such a question, or in whose favor they shall render their judgment, because such action would result in the substitution of the judgment and opinion of the commanding court for that of the judicial officers to whose judgment and discretion the law intrusted the decision of the issue. For the same reason it cannot be invoked to compel a court or a judicial officer to reverse a decision already rendered, to correct an erroneous conclusion, or to render another decision, even though there may be no other method provided by the law for the review or correction of the error. *In re* Harless, 85 Fed., 177, 180, 29 C. C. A. 78, 81, 56 U. S. App., 33, 37; *In re* Rice, 155 U. S., 396, 403, 15 Sup. Ct., 149, 30 L. Ed., 198; American Const. Co. v. Jacksonville, T. & K. W. Ry. Co., 148 U. S., 372, 379, 13 Sup. Ct., 758, 37 L. Ed., 486; *In re* Parsons, 150 U. S., 150, 156, 14 Sup. Ct., 50, 37 L. Ed., 1034; *Ex parte* Morgan, 114 U. S., 174, 5 Sup. Ct., 825, 29 L. Ed., 935; *Ex parte* Whitney, 13 Pet., 404, 10 L. Ed., 221; *In re* Atlantic City R. Co., 164 U. S., 633, 635, 17 Sup. Ct., 208, 41 L. Ed., 579; *In re* Westervelt, 98 Fed., 912, 39 C. C. A., 350. * * *"

Concluding, he says (p. 662):

"Under the settled rules to which attention was called in the opening of this opinion, no court has jurisdiction by the use of the writ of mandamus to substitute its own opinion for that of the tribunal to which the law intrusted the decision of these questions, to control the judicial discretion of that tribunal, to correct its errors, or to reverse its decision. The judgments of the courts below were right, and they are affirmed."

The case at bar, therefore, differs from all the cases in which a writ of *mandamus* has been granted, in that the court below had jurisdiction of the case under the removal statutes, if in fact a separable controversy existed. The Court had likewise, clear judicial discretion to determine that fact. It did so determine it, and to now grant the writ of *mandamus*, commanding the court below to reverse its judgment in that particular, would be to substitute this court's judgment for the judgment of the Circuit Court in that respect. This is the office, not of the writ of *mandamus*, but of a writ of error or appeal.

POINT II.

The proper and adequate remedy is by appeal after entry of final judgment or decree.

It is abundantly shown by the authorities already referred to, that the writ of *mandamus* cannot be used to perform the functions of an appeal or writ of error, and is only granted when there is no other adequate remedy available. It is necessary, therefore, to determine whether the petitioner has an adequate remedy by way of an appeal or writ of error.

STATUTES.

By Sec. 5, of Ch. 517 of the Act of May 3, 1891, (1 Supplement Revised Statutes 903) it is provided:

"That appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court in the following cases:

"In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision."

It is clearly shown by the following authorities that

the foregoing statute provides an adequate remedy to the petitioner by way of direct appeal to the Supreme Court of the United States from a final judgment or decree.

DECISIONS.

In the case of

Graves vs. Corbin,
[132 U. S., 571],

a bill in equity had been filed in the State Court by a creditor of a partnership to reach partnership assets. The prayer of the bill was that certain judgments confessed by the firm in favor of various parties defendant, some of whom were citizens of the same State as plaintiff, might be set aside as fraudulent. One of the defendants, a citizen of a different State from the plaintiff, removed the entire cause into the Circuit Court of the United States, alleging in his petition for removal that the complaint set forth a separable controversy, which could be fully determined as between him and the plaintiff without the presence of any of the other parties defendant.

After a transcript of the record was filed in the Circuit Court, the plaintiff moved to remand the case to the State Court, and this motion having been considered by the Circuit Court, was denied, and the suit proceeded to final decree in favor of the plaintiff. On an appeal from this decree, the Supreme Court of the United States held that the case was not removable under the Act of March 3, 1875, the allegations of the bill showing that there was but a single controversy between the plaintiff and all of the defendants, reversed the decree and remanded the case to the Circuit Court, with directions to remand it to the State Court for a retrial.

In delivering the opinion of the Supreme Court, Mr. Justice BLATCHFORD says (p. 590) :

" Under the provision of section 5 of the act of March 3, 1875, 18 Stat. 472, that if, in any suit removed from a state court to a Circuit Court of the United States, it shall appear to the satisfaction of

said Circuit Court, at any time after such suit has been removed thereto, that it does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court, it shall proceed no further therein, but shall remand the suit to the court from which it was removed, as justice may require, this court has held that when it appears to this court that the case is one of which, under that provision, the Circuit Court should not have taken jurisdiction, it is the duty of this court to reverse any judgment given below, and remand the cause with costs against the party who wrongfully invoked the jurisdiction of the Circuit Court. *Williams* v. *Nottawa*, 104 U. S. 209. This rule has been recognized by this court to the extent even of taking notice of the want of jurisdiction in the Circuit Court, although the point has not been formally raised in that court or in this court, in *Turner* v. *Farmers' Loan & Trust Co.*, 106 U. S. 552, 555; *Mansfield &c. Railroad* v. *Swan* 111 U. S. 379, 386; *Farmington* v. *Pillsbury*, 114 U. S. 138, 144; and *King Bridge Co.* v. *Otoe Co.*, 120 U. S. 225, 226.

"* * * It is suggested that it is a hardship to the plaintiff to reverse his decrees for want of jurisdiction in the Circuit Court after he has prosecuted his suit in that court successfully, on his being taken into that court adversely more than six years ago. *The answer is that the jurisdiction of this court in the present case to review the question of the jurisdiction of the Circuit Court could only arise on the hearing of an appeal from a final decree of the latter court, because by § 5 of the act of March 3, 1875, 18 Stat. 472, this court was authorized to review only an order of the Circuit Court remanding a cause, and not one retaining jurisdiction over it.* Even that provision was repealed by § 6 of the act of March 3, 1887, 24 Stat. 555; and this court can now review a question as to the jurisdiction of a Circuit Court only in reviewing a final judgment or decree, although by the act of February 25, 1889, 25 Stat. 693, it may do so in a case not involving over $5000."

In the case of

Missouri Pacific Railway Company vs. Fitzgerald,

[160 U. S. 556]

which was decided after the passage of the Judiciary Act of March 3, 1891, an attempt was made to secure a

review by the Supreme Court of the United States of an order remanding the case to the State Court, the plaintiff in error having secured a writ of error to the State Court after the entry of a final judgment.

In dismissing the writ of error, the Supreme Court, speaking through Mr. Chief Justice FULLER, reviews the history of the legislation relating to the removal of causes, and states (p. 582):

"If a case be removed to the Circuit Court and a motion to remand be made and denied, then after final judgment the action of the Circuit Court in refusing to remand may be reviewed here on error or appeal. *Graves v. Corbin*, 132 U. S. 571.

"If the Circuit Court and the state court go to judgment, respectively, each judgment is open to revision in the appropriate mode. *The Removal cases*, 100 U. S. 457."

In the following cases, all of which have been decided since the passage of the Judiciary Act of May 3, 1891, the jurisdiction of the Federal Court has been reviewed by an appeal or writ of error: *Remington vs. Central Pacific Railroad Company*, 198 U. S., 95; *Dawson vs. Columbus Trust Company*, 197 U. S., 178; *Thomas vs. Board of Trustees*, 195 U. S., 207; *Raphael vs. Trask*, 194 U. S., 272; *Minnesota vs. Northern Securities Company*, 194 U. S., 48; *Geer vs. Mathieson Alkali Works*, 190 U. S., 428; *Hennessy vs. Richardson Drug Company*, 189 U. S., 25; *Boston & Montana Consolidated Copper, &c., Company vs. Montana Ore Purchasing Company*, 188 U. S., 632; *Mexican Central Ry. Company vs. Eckman*, 187 U. S., 429; *Wheless vs. St. Louis et al.*, 180 U. S., 379; *Loeb vs. Columbia Township Trustees*, 179 U. S., 472; *Louisville, &c., Ry. Company vs. Louisville Trust Company*, 174 U. S., 552; *New Orleans vs. Quinlan*, 173 U. S., 191; *Barrow Steamship Company vs. Kane*, 170 U. S., 100; *Wetmore vs. Rymer*, 169 U. S., 115; *Mattingly vs. N. W. Virginia Railroad Company*, 158 U. S., 53; *Mexican Central Railroad Company vs. Davidson*, 157 U. S., 201.

The foregoing are the more important cases bearing upon the question at issue. In none of them has this court sanctioned the issue of a writ of mandamus requiring the remanding of a case by a lower court, where the statutory prerequisites of removal appeared in the record, and the court below, in the exercise of its judicial functions and within the scope of its jurisdiction, has performed a judicial act.

In the present case the record discloses :

An action commenced by a citizen and resident of the Southern District of New York, in the Supreme Court of that State, against The Wabash Railroad Company, a foreign corporation, and other defendants, some of whom are residents of the State of New York, in which action the matter in dispute exceeded the sum of $2,000, exclusive of interests and costs.

A petition and bond are filed by the defendant The Wabash Railroad Company, in the form prescribed by law, for the removal of the action into the Circuit Court of the United States for the Southern District of New York, on the ground that the other defendants were not indispensable or necessary parties to the complete determination of a separable controversy, which was entirely between the plaintiff and the removing defendant, citizens of different States.

After the record is filed in the United States Circuit Court, a motion to remand the case is made by the plaintiff and argued, the grounds of the motion being stated.

The decision is rendered by the court below denying the motion to remand and sustaining the right of removal asserted by the removing defendant, and an order is entered thereon.

In the present case we find, therefore, no absence from the record of the requirements necessary to permit a removal of the case. On the contrary, all necessary requirements affirmatively appear.

The whole issue upon the motion to remand is, whether a complete determination of a separable controversy can be had without the presence of the defendants other than The Wabash Railroad Company,

and this question has been judicially determined by the proper tribunal, to which it was regularly presented. To issue a writ of *mandamus* to that tribunal, directing the remand of the action, would constitute a premature review and reversal of this judicial determination in a manner not permitted by law.

Whether or not the other defendants were indispensable parties ; whether or not a separable controversy existed, are judicial questions which have been decided by the proper tribunal, whose decision thereon is final until reversed in the regular manner.

The correctness or incorrectness of the judicial action taken by the court below in deciding these questions cannot be reviewed by this Court at this time and in the manner sought. Such action has been taken, and the right of the court to act may be considered ; but it appearing that this right existed and that the judicial action was taken without abuse of judicial discretion, the petitioner must await the entry of a final judgment before attempting to review by appeal the action of the court below.

POINT III.

In not discussing the question elaborately presented in petitioner's brief that there is no separable controversy we do not concede this contention. In our view, in the present status of the case, the discussion is irrelevant.

The rule should be discharged and the petition for mandamus denied.

Respectfully submitted,

RUSH TAGGART,

LAWRENCE GREER,

Attorneys for Respondents.

Supreme Court of the United States.

No. 16, Original—October Term, 1906.

In re James Pollitz, Petitioner. } Petition for Writ of Mandamus.

[May 27, 1907.]

James Pollitz, a citizen of the State of New York, brought suit in the Supreme Court of the State of New York for the county of New York against the Wabash Railroad Company, a consolidated railroad corporation existing under the laws of the States of Ohio, Michigan, Illinois and Missouri, and a citizen of the State of Ohio; and sundry other defendants, chiefly citizens and residents of the State of New York, being individual directors of the railroad company; the trust company, registrar of the stock of the railroad company; a committee representing debenture holders; mortgage trustees, etc. The complaint alleged in substance that the railroad company in 1906 entered into certain negotiations for the retirement of the debenture mortgage bonds of the company through the issue of other securities, both bonds and stocks, and that the plan to accomplish that end was subsequently authorized and approved by the stockholders of the company and debenture mortgage bond holders, at a meeting at Toledo, October 22, 1906, at which the issue of certain new bonds and preferred and common stock of the company and the exchange of certain new bonds, preferred and common stock, for the company's debenture mortgage bonds was authorized and approved. The complaint alleged that the plan of exchange was unlawful, unauthorized, and contrary to the laws of the States in which the company was organized, and was unjust, inequitable and injurious to complainant, who claimed to be the owner of one thousand shares of the common capital stock of the railroad company. It was also alleged that ninety per cent of the debenture holders voted in favor of the exchange, and that the plan had been carried out as to more than nine-tenths of the debenture bonds, and new bonds and stocks to the requisite amount had been issued. And it was prayed that the plan "be decreed and adjudged to be *ultra vires*, and that all said bonds and the preferred and common stock, used and issued and applied by the said Wabash Railroad Company for the purpose and plan of said scheme be decreed and adjudged of no effect." The complaint prayed in the alternative that if the court should decree that Pollitz was not entitled to the main relief he had asked, then that he might have an accounting by the defendant officers and directors of the railroad company, etc., in re-

spect of the new bonds and common and preferred stock which had been issued under the plan of exchange.

The railroad company filed its petition to remove the case into the Circuit Court of the United States for the Southern District of New York, which set forth in substance the foregoing matters, and further averred:

"That your petitioner disputes the claim against it as set forth by the plaintiff in his complaint, and denies that the plaintiff is entitled to the judgment and relief prayed for against this petitioner or to any judgment or relief against it; and this petitioner alleges that the fundamental and primary controversy, as set forth in said complaint, is whether or not the plan for the exchange of the debenture mortgage bonds by this petitioner, the authorization and creation by it of the new securities in the said complaint set forth and the issue of the same by it for the purpose of carrying said plan into effect is, as alleged in said complaint, illegal, unlawful, void and prohibited by the charter of this petitioner and the laws under which it is incorporated; and whether said new securities are, as alleged in said complaint, invalid and void; and that such controversy is a separable and distinct controversy between the plaintiff and this petitioner;

"That a complete determination of said controversy can be had without the presence of any of the defendants in this action other than this petitioner; and that all of said other defendants are neither indispensable nor necessary parties to the complete determination of said controversy.

"That the foregoing controversy, which is solely between the plaintiff and the petitioner, must be determined before any other controversy alleged in the complaint can be considered and determined; and that said controversy between the plaintiff and this petitioner, as above set forth, is separate and distinct from any other or further controversy;

"That said fundamental and primary controversy herein between the plaintiff and this petitioner is a controversy wholly between citizens of different States—to wit: Between the plaintiff, a citizen of the State of New York, and this petitioner, a citizen of the State of Ohio."

The cause was removed, and Pollitz made a motion to remand, which was denied by the Circuit Court, Lacombe, J., presiding.

Pollitz thereupon applied to this court on March 18 for leave to file a petition for a writ of mandamus directing the cause to be remanded to the State court. Leave to file was granted March 25, and a rule was entered thereon returnable April 8, to which return was duly made to the effect that the order denying the motion of Pollitz to remand the cause had been made and entered in the exercise of the jurisdiction and judicial discretion conferred upon the Circuit Judge by law and for the reasons expressed in his opinion filed with the order. The case was heard on the return to the rule.

Mr. Chief Justice FULLER delivered the opinion of the Court:

The suit was commenced in the State court by a citizen and resident of the city, county and State of New York against a corporation, a citizen

of the State of Ohio, and other defendants, many of whom were residents and citizens of the State of New York, the value of the matter in dispute, exclusive of interest and costs, exceeding the jurisdictional sum.

The defendant, the Wabash Railroad Company, a citizen of Ohio, filed its petition and bond in proper form for the removal of the suit into the United States Circuit Court for the Southern District of New York, on the ground of separable controversy so far as it was concerned, and it was removed accordingly. A motion to remand was made and denied by the Circuit Court, which held that the controversy was separable, and that the other defendants were not indispensable or necessary parties to the complete determination of that separable controversy.

The issue on the motion to remand was whether such determination could be had without the presence of defendants other than the Wabash Railroad Company, and this was judicially determined by the Circuit Court, to which the decision was by law committed.

The application to this court is for the issue of the writ of mandamus directing the Circuit Court to reverse its decision, although in its nature a judicial act and within the scope of its jurisdiction and discretion.

But mandamus cannot be issued to compel the court below to decide a matter before it in a particular way or to review its judicial action had in the exercise of legitimate jurisdiction, nor can the writ be used to perform the office of an appeal or writ of error.

Where the court refuses to take jurisdiction of a case and proceed to judgment therein, when it is its duty to do so and there is no other remedy, mandamus will lie unless the authority to issue it has been taken away by statute. *In re Grossmayer, Petitioner,* 177 U. S. 48; *In re Hohorst, Petitioner,* 150 U. S. 653. And so where the court assumes to exercise jurisdiction on removal when on the face of the record absolutely no jurisdiction has attached. *Virginia* v. *Paul,* 148 U. S. 107; *Ex parte Wisner,* 203 U. S. 449.

"In *In re Hohorst, Petitioner,* 150 U. S. 653, the bill was filed in the Circuit Court of the United States for the Southern District of New York against a corporation and certain other defendants, and was dismissed against the corporation for want of jurisdiction. From that order complainant took an appeal to this court, which was dismissed for want of jurisdiction because the order, not disposing of the case as to all the defendants, was not a final decree from which an appeal would lie. 148 U. S. 262. Thereupon an application was made to this court for leave to file a petition for a writ of mandamus to the judges of the Circuit Court to take jurisdiction and to proceed against the company in the suit. Leave was granted and a rule to show cause entered thereon, upon the return to which the writ of mandamus was awarded." *In re Atlantic City Railroad,* 164 U. S. 633.

In *Ex parte Wisner*, Wisner, a citizen of the State of Michigan, commenced an action at law in the Circuit Court for the city of St. Louis, State of Missouri, against Beardsley, a citizen of the State of Louisiana. After service of summons on Beardsley, he filed his petition to remove the action from the State court into the Circuit Court of the United States for the Eastern District of Missouri, on the ground of diversity of citizenship, with the proper bond, and an order of removal was made by the State court, and the transcript of record was filed in the Circuit Court. Wisner (who had had no choice but to sue in the State court) at once moved to remand the case, on the ground that the suit did not raise a controversy within the jurisdiction of the Circuit Court, and that as it appeared on the face of the record that plaintiff was a citizen and resident of Michigan, and defendant a citizen and resident of Louisiana, the case was not one within the original jurisdiction of the Circuit Court, in accordance with the statute providing that where jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant. The motion to remand was denied, and Wisner applied to this court for a writ of mandamus which was subsequently awarded.

In the present case the removal was granted and sustained on the ground that there was a controversy between the removing defendant and plaintiff, which could be fully determined as between them without the presence of the other defendants. That being so, the suit might have been brought originally in the Circuit Court against the railroad company as sole defendant.

If the ruling of the Circuit Court was erroneous, as is contended, but which we do not intimate, it may be reviewed after final decree on appeal or error. *Missouri Pacific Railway Company* v. *Fitzgerald*, 160 U. S. 556, 582.

Rule discharged; petition dismissed.

True copy.

Test:

Clerk Supreme Court, U. S.